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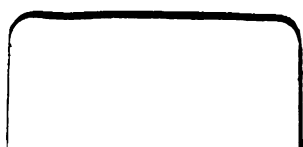
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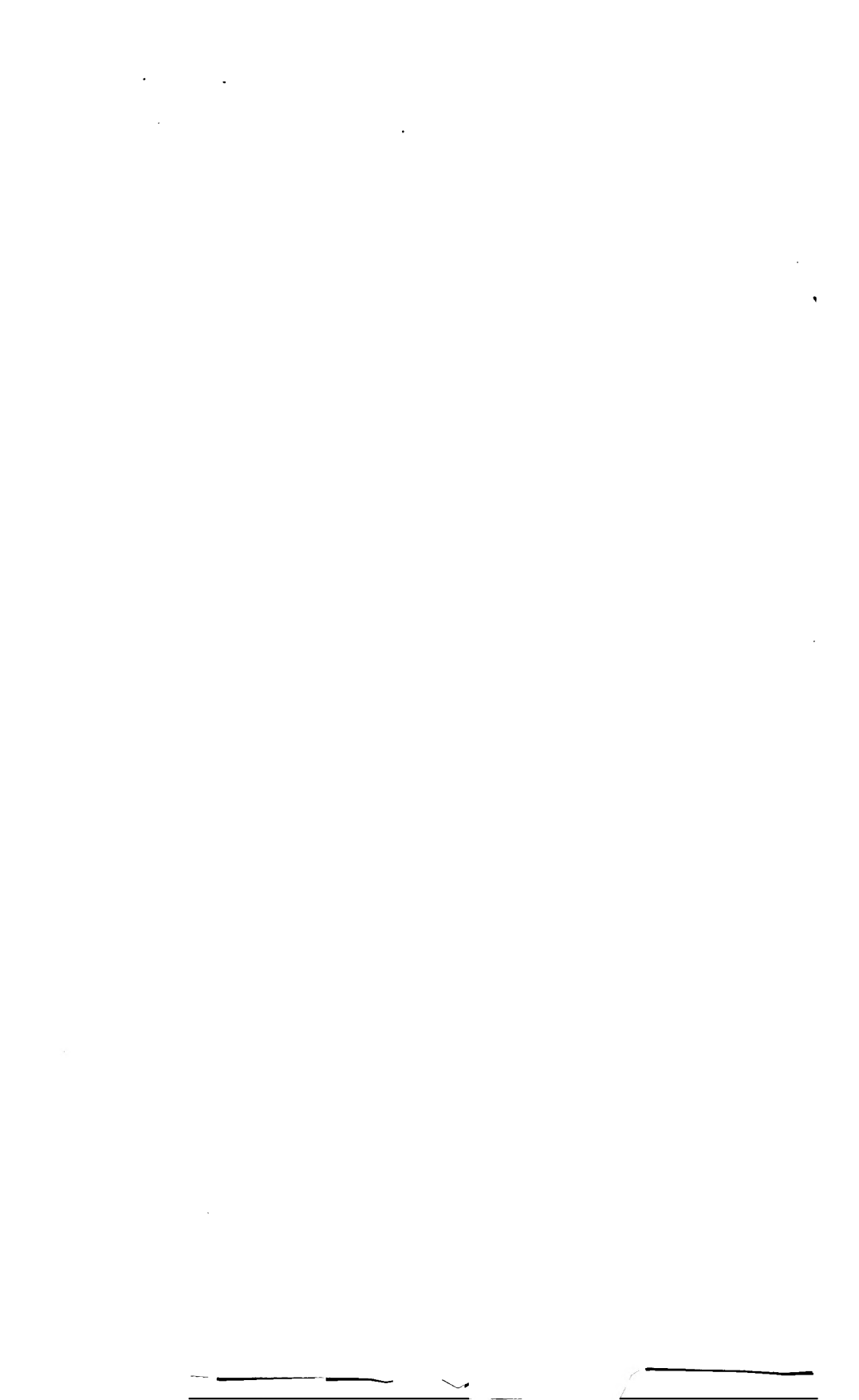
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THE  
**REVISED REPORTS**

BEING  
A REPUBLICATION OF SUCH CASES  
IN THE  
ENGLISH COURTS OF COMMON LAW AND EQUITY,  
FROM THE YEAR 1785,  
*AS ARE STILL OF PRACTICAL UTILITY.*

EDITED BY  
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## PREFACE TO VOLUME XXXVI.

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QUITE a good number of familiar cases, in constant use for proof or illustration of the points which they left settled, will greet the learned reader in this volume. For the sale of goods we have a classical case on warranty, *Street v. Blay*, p. 626, and one on "independent promises," *Withers v. Reynolds*, p. 782. *Good v. Cheesman*, p. 574, is the leading authority on the doctrine of compositions with creditors, and disposes with legal elegance as well as practical good sense of the apparent difficulty about finding the consideration for each creditor accepting less than the full amount of his debt.

In *Cadell v. Palmer*, p. 128, the House of Lords put the finishing touch to the rule against perpetuities; the rule itself, we say, not the limits of its application, for these are still the subject of critical discussion among conveyancers, to which Mr. Cyprian Williams's article on "Contingent Remainders and the Rule against Perpetuities," in the "Law Quarterly Review" for July, 1898, is the latest contribution. With regard to the actual decision in *Cadell v. Palmer*, that the term of twenty-one years allowed after lives in being need have no reference to a minority, our learned friend, Prof. John C. Gray, of the Harvard Law School, while allowing that "the allowance of a gross

term of some length is highly convenient," says that "the result seems to have been arrived at by accident rather than by any process of judicial reason": Gray on the Rule against Perpetuities, section 186, where passages are collected showing that Lord Brougham, then Chancellor, himself considered it a case of *communis error facit jus*.

*Leith v. Irvine*, p. 319, is—or was—a leading case on the rights of mortgagees of West India estates; and *Blakemore v. Glamorganshire Canal Navigation*, p. 289, a case which occupied the Courts for just eight years, is still good authority on the discretion of equity in granting injunctions.

The opinion delivered by Mr. Justice (afterwards better known as Baron) Parke to the House of Lords in *Mirehouse v. Rennell*, at p. 180, contains, perhaps, the best statement ever formulated of our system of judicial precedents. A curious contrast to his vigorous and logical method is presented by the contrary opinion of his all but namesake James Alan Park in the same case, at p. 192 *sqq.*

*Moore v. Robinson*, p. 756, is believed to be the reported case which goes farthest in favour of allowing a servant entrusted with a chattel, and having the temporary control of it, to bring trespass in his own name against a stranger. The subject has never been adequately reviewed as a whole by judicial authority.

In *Kent v. Shuckard*, at p. 752, Lord Tenterden goes to Ulpian for the reason of an innkeeper's liability, but without speculating on any historical connection of the similar rules in the civil and the common law. Lord Tenterden's successors have not always imitated his discretion.

*Rogers v. Wood*, p. 554, throws an accidental light, by

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no means without constitutional interest, on the history of the Court of Exchequer. Apparently Queen Elizabeth thought herself entitled to do very much what she pleased in her Remembrancer's Office, and purported to decide questions of disputed privilege and jurisdiction by special and occasional Commissions. The modern Court of King's Bench pronounced the resulting document "one of a very irregular character," not being a decree of the Court of Exchequer or of any other court of justice known at the time, and therefore not receivable. At the time the proceedings were probably supposed to be well within the general administrative powers or residual jurisdiction of the Crown.

At p. 119 we read that in the last week of June, 1832, the House of Lords "adjourned for some time, during which their Lordships went up to present an address to the King on his escape from the attack made on his Majesty at Ascot Heath." For the satisfaction of any curious reader we subjoin the particulars of this event from a presumably trustworthy contemporary account :—

"Their Majesties having attended Ascot races, while the King was looking out of the window of the stand, two stones were thrown from the midst of the crowd below, one of which struck his Majesty severely on the forehead—but the hat saved him from any injury."—*Annual Register*, 1832, June 19.

The assailant was a discontented Greenwich pensioner, one Collins, stated to have been of bad character. The supposed grievances were personal and had nothing to do with the Reform Bill, so that the incident was wholly without political significance.

In *R. v. Justices of Middlesex*, p. 758, the Court of King's Bench had to consider which of two conflicting enactments framed by the wisdom of Parliament in the same session was entitled to obedience, and decided that the one which last received the royal assent must be taken to have repealed the other so far as inconsistent with itself, and must therefore prevail. The Acts in question were both local Acts, and probably the managers of each were unaware that the other was pending. Legislative blunders of this kind are rare in our own time, though it would be rash to say that they never occur.

F. P.

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NEW YORK  
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1831—1833.

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## NOTE.

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*The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.*



# The Revised Reports.

VOL. XXXVI.

IN THE HOUSE OF LORDS.

APPEAL FROM THE COURT OF EXCHEQUER CHAMBER.

DOE D. HEARLE AND OTHERS *v.* HICKS (1).

(1 Clark & Finnelly, 20—34; S. C. 6 Bligh (N. S.) 37.)

Where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest: if there was only a reasonable doubt, the first devise ought to stand.

A testator devised his copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees, on trust for his wife for life, and subsequently, by one of several codicils revoking several of the dispositions made by his said will of all his freehold copyhold and personal estate, he, instead of such disposition, devised all his freehold copyhold and personal estate to his daughter: Held, that the devise of the estate to his wife for life was not affected by this codicil.

THIS was an action of ejectment brought in the Court of Exchequer, in Hilary Term, 1826, for the recovery of a copyhold tenement and farm, called Plomer Hill House, with the appurtenances, situate in the manor of West Wycombe, in the county of Buckingham. The declaration contained several demises by Francis Hearle, and Anna Maria his wife, and by

(1) See the principle of this decision applied in *Leslie v. Rothés*, '94, 2 Ch. 499, 63 L. J. Ch. 617, 71 L. T. 134, C. A.; and in *Re Freme's Estate, Freme v. Hall*, '95, 2 Ch. 778, 64 L. J. Ch. 862, 73 L. T. 366, C. A.—R. C.

1831.  
*July 6.*  
1832.  
*May 25.*

Lord  
BROUGHAM,  
L.C.  
Lord  
WYNFORD.  
TINDAL,  
Ch.J.  
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Francis Hearle alone, on the 15th day of August, 1825. The defendant pleaded the general issue. The cause was tried at Aylesbury, at the Spring Assizes for 1826, before Mr. Justice Holroyd. The jury found a special verdict, stating in substance that John Hicks was, at the time of making his will, seised in fee of certain freehold lands in Cornwall and Buckingham, and of a certain copyhold messuage or mansion-house, lands and hereditaments, with the appurtenances, called Plomer Hill House, being the premises mentioned in the declaration, situate in the parish of West Wycombe, in the said county of Bucks: that the said John Hicks, on the 4th day of May, 1821, duly made and published his will in writing, executed and attested so as to pass real estate, and which will (amongst other devises) contained the following:

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“In the first place, I give and devise all that my copyhold messuage, &c. called Plomer Hill House, in the parish of West Wycombe aforesaid, and now in my own occupation, together with the cottages or tenements and premises thereunto belonging, with their appurtenances, unto and to the use of R. B. Slater, the Earl of Cardigan, Joseph Holden Strutt, and George Farr, their heirs and assigns, upon trust for my present dear wife Susanna Jemima Hicks during her life or widowhood, or until she shall cease to reside at the said premises, or let the same, or permit them to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair; and from and after the decease or second marriage of my said wife, or on her ceasing to reside at the said premises, or letting the same to or permitting them to be occupied by any other person than herself, then and in either or any of the said cases, and whichever of the said events shall first happen, my said trustees, their heirs and assigns, shall stand and be seised or possessed of the said copyhold hereditaments and premises, with the appurtenances, upon and for such trusts, intents and purposes, and with, under, and subject to the powers, provisoes and declarations as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best or nearest correspond with the uses, trusts, &c. hereinafter expressed and declared of and

concerning the residue of my real estates, or such and so many of them as shall be then existing undetermined and capable of taking effect."

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That on the 10th May, the 15th and 18th July, and 14th September, 1822, the said John Hicks added codicils to his will, the last of which (the only one important \*to be considered in this case) was in the following terms :

[ \*22 ]

And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold and personal estate and effects of all and every kind and description, and instead and in the place of such devise, disposition and bequest thereof, I do give, devise and bequeath all and every my freehold, copyhold and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto my daughter Anna Maria Hearle ; and from and after the determination of that estate, I give, devise and bequeath the same unto my grandson John Graves, and his heirs, in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs ; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. And I do further give and bequeath unto my dear wife Jemima one other annuity of one hundred pounds to be paid her in like manner and with the like restrictions as the former ones given her by my will and codicils, hereby in all other respects but what is above-mentioned confirming my said will and codicils.

This codicil was executed so as to pass real estate.

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John Hicks died on the 21st day of June, 1825, seised of his said several estates, without revoking or adding to his will, except as appears by the said codicils respectively, leaving his wife, the defendant, and the said Anna Maria Hearle, one of the lessors of the plaintiff, him surviving.

The question for the consideration of the Court was, whether the devise contained in the will, by which the Plomer Hill Estate was given to the testator's wife, had been revoked by the terms of the fourth codicil.

The case was argued in the Court of Exchequer on the special verdict in Michaelmas Term, 1826; and in Hilary Term, 1827, the Court gave judgment for the plaintiff.

In Easter Term, 1827, the defendant below brought a writ of error in the Exchequer Chamber. The case was argued before that Court in the following vacation; and in Trinity Term, 1827, the Court reversed the judgment of the Court of Exchequer.

The plaintiff below brought his writ of error here, praying that the judgment of the Court of Exchequer might be affirmed, and the reversal thereof by the Court of Exchequer Chamber reversed.

The case was argued before the Judges by *Sir E. Sugden* and *Mr. Follett* for the appellant, and by *Mr. Serjeant Russel* and *Mr. Patch* for the respondent.

Lord WYNFORD (who presided as Deputy Speaker): I am always glad, my Lords, to see the Judges in this House. I am more so now, as I was one of those who advised this judgment in the Court below, so that if they had not been here I should certainly not have taken this seat. His Lordship, after having stated the will and codicil, said: The question for your Lordships \*is, what effect this codicil has on the devise of this estate in the will; and for the purpose of deciding that, I shall move that this question be put to the Judges—whether, according to the true construction of the will and codicil as above set forth, the devise of the Plomer House Estate was revoked by the fourth codicil?

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The Judges took time to consider the question.

TINDAL, Ch. J. afterwards delivered, on their behalf, a judgment, of which we have, by his Lordship's favour, received the following authentic copy :

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My Lords, the question which your Lordships have been pleased to propose to his Majesty's Judges is this; whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage or mansion-house, barns, stables, buildings and pleasure-grounds, lands and hereditaments, called the Plomer Hill Estate, was revoked by the fourth codicil: and upon this question, though it must be admitted to be difficult to draw any certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments, is, that the devise in the will above specified was not revoked by the fourth codicil. The general principle upon which this opinion proceeds may be stated thus: The testator does by his will shew a clear and manifest intention to devise the Plomer Hill Estate to his wife for life, or during her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if \*there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand. My Lords, it is the opinion of my learned brothers and myself, that the clause of revocation, contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will. In this general conclusion we all agree; but it is scarcely to be expected that, in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your Lordships those grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the proper construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say I am expressing the opinion

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of all my learned brothers in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent or diversity of opinion in respect to any. That the testator not only intended to devise to his wife the enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of the devise in his will. "In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables and buildings, pleasure-grounds, lands and hereditaments, called Plomer Hill House, in the parish of West Wycombe, and now in my own occupation, together with the cottages or tenements or premises thereto belonging, to the \*trustees (therein named) and their heirs, upon trust for my present dear wife Susanna Jemima Hicks, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair;" and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seised and possessed of these copyhold premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estates. He afterwards devises to his wife all his money in the funds during her life or widowhood, and after her death or marriage to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500*l.*, as therein mentioned, and then gives to her absolutely all the ready money which shall happen to be in his mansion called Plomer Hill House at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions and provendor, live and dead stock, which at the time of his decease "shall be on or about the said copyhold premises," and then devises, "all his household goods, furniture, books, prints, pictures, china,

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[ \*27 ]

glass, and plate, not thereinbefore bequeathed, unto the trustees, in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold mansion and premises, and after the determination of her estate in the same, in trust absolutely for the person \*who then, either as tenant for life or in tail male, shall be in the actual possession of his residuary real estates." The testator, therefore, by his will, has not only devised the mansion to his wife, but has shewn a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not in any manner be dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death. In his first codicil, made after the interval of a year, it is evident that the same intention that his wife should reside in the mansion-house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, &c., "and all other his effects which should be in or about his residence at Plomer Hill aforesaid, and usually considered as comprised in and constituting his establishment there" unto his wife, for her own use and benefit absolutely. It is further to be observed, that the testator's wife appears to have been, from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard, there being no codicil, with the exception perhaps of the third, which does not materially add to the provision already made for her by the previous dispositions in her favour. The will gives his wife a rent-charge of 300*l.* a year for life, charged upon the residue, with a contingent increase of 100*l.* per annum in case of the failure of issue of his son. By the first codicil, made after the death of his son without issue, he gives \*his wife absolutely the additional annuity of 100*l.* per annum, and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her his sole executrix and

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residuary legatee; by the third codicil, he gives her the proceeds and profits of the five shares which he held in the County Fire Office for her life; by the fourth, the codicil in question, he gives to his wife a further annuity of 100*l.* for life; and by the fifth, he gives to her, and at her disposal, all sums of money which she or the testator might be entitled unto out of the effects of her late father, or that any other friend might leave her: and he orders his executors, in case she shall die before him, to fulfil her will and disposal thereof. This codicil was executed about nine months subsequently to that upon which the question arises. The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called Plomer Hill, and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely improbable in itself that the testator should, by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself and first codicil, and her residence in which during her widowhood appears to have been the favourite object of his mind. Still, however, the question arises, whether he has, by the fourth codicil, revoked this devise or not. That the words used in the codicil do not necessarily revoke this devise is sufficiently manifest by referring \*to them. The testator begins by saying, "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects of all and every kind and description;" and concludes it by saying, "that hereby in all other respects but what is above-mentioned confirming my said will and codicils." There are no words therefore expressly revoking this devise; on the contrary, if we hold all the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument

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that the devise to the wife may be one of those, or the very one, which the testator intended to confirm, as that it was one of the several which he intended to revoke. Whether, therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration, whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife; or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together. To consider this question it is necessary, in the first place, to observe how the disposition of the testator's property stood under the will, and the first codicil, at the time when the fourth codicil was made; and upon a careful inspection of the will and first codicil, it will be found that at the time of executing the fourth codicil the testator's real property stood thus disposed of, viz. the copyhold estate (the Plomer Hill House), was devised to the wife for life, the remainder forming part of the residue. The Treravel estate stood thus: an equitable \*estate to his daughter, Anna Maria Hearle, for life, for her separate use, remainder to her husband for life, remainder to her children in tail, as tenants in common, the remainder forming part of the residue. The residue of his property, consisting of the manor and advowson of Bradenham, two freehold farms in the county of Bucks, and so much of the testator's estate in the Plomer Hill House and the Treravel property as was undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass, which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, John Graves, for life; remainder to his first and other sons in tail male; remainder to the first and other sons of the testator's daughter, Anna Maria Hearle, in tail male; remainder to his own right heirs. Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils of all his freehold, copyhold, and personal estate and effects of all and

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every kind and description, "instead and in the place of such devise, dispositions and bequests thereof, he gives, devises and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, Anna Maria Hearle, and from and after the determination of that estate, unto his grandson, John Graves, and his heirs, in strict entail, as in the said will mentioned;" with the additional clause in the codicil as to the time when John Graves shall take: and in failure of such issue of the said John Graves, he orders that his said \*estate and effects shall go and descend as is by his said will directed; and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed; and gives a further annuity of 100*l.* to his wife, under the same restrictions as the former. Now if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question to the wife for her life will remain unrevoked, and the object of the testator in his codicil may still be carried into effect; and that such may be the construction, without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "several of the dispositions heretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description." Now the only disposition made of all his freehold, copyhold, and personal estate and effects, is that devise which relates to the residue, in which all his property, freehold, copyhold and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil. In the second place, the testator says, "instead of such devise, disposition and bequest," using the singular number, which would in strict grammatical construction be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will. In the third place, the death of his only surviving son, William, who was

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the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in \*the residuary clause his only surviving daughter to take the same estate therein which was before given to the son. In the fourth place, if the devise to the wife of the copyhold estate is to be held to be revoked, then, not several only of the dispositions of the real property contained in the will, but all such dispositions, are revoked or altered; for the wife's life estate in the Plomer Hill property is gone; the equitable estate for life given by the will to the daughter in the Treravel estate for her separate use is merged in a legal estate for life, given to her generally, and the daughter has a life estate in the residue, now for the first time interposed before that of John Graves. But to revoke all the dispositions of the realty in the will and codicil is against the express directions of the testator. Still further, if the devise of the Plomer Hill Estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to every thing which constitutes the establishment of that house. So that the house, upon the death of the late testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an immediate estate for life to A. M. Hearle, and from and after the determination of that estate, to his grandson John Graves, and his heirs, in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of John Graves, that is, to the disposition of the residue. It seems therefore a very reasonable construction of the codicil to infer, that as the ultimate remainder of the property intended to be thereby disposed of is limited by express \*reference to the clause in the will which contains the devise to John Graves in strict entail, the property itself devised by the codicil, is the same property as that contained in the devise of the will to which such reference is made, viz. the residue only. By this construction the only alteration effected by the codicil is, the substitution of a

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devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves. But if the devise operates on the residue only, as before mentioned, it leaves the particular estate already devised to the widow untouched. There are undoubtedly some difficulties attending the construction of the will and codicil whichever way they are construed. It may be said against the construction above made, that the words of devise in the codicil to the daughter are immediate, and that the testator, by his first codicil, shews that he knew how to interpose a new estate, by proper terms, between those already created by the will. It certainly is so; but it is obvious, in comparing the frame of the first and the fourth codicils, and looking to the description of the witnesses to each respectively, that the former was made with, the latter without, legal assistance; so that no great reliance can be placed on that argument. It may be argued again, that the testator by the codicil directs, that in case his grandson shall not be 31 at the time the estates shall devolve on him by the death of the testator's daughter, the rents shall accumulate for his benefit, and that if the wife took a life estate in the copyhold, *non constat* that she might survive the daughter, in which case the Plomer Hill Estate would not devolve to the grandson on the daughter's death. But it is not at all surprising for a testator, in preparing such an instrument, to have overlooked or not cautiously provided for the possibility of his wife outliving his daughter, \*the more especially when the devise to the wife related only to part of the estate. It may further be contended that, by the fifth codicil, the testator has proved that he was aware that the fourth codicil had revoked the estate for life, which he had previously given by the first codicil, to his son-in-law: for he could not otherwise have devised to him the rents and profits of the Treravel estates during his life. It must be granted that the fourth codicil had necessarily that effect; but this arises not from his devise of the life estate to his daughter, for the only effect of that devise was to convert her equitable estate for her own separate use into a legal estate for life, but it arises from the devise to the grandson being made "from and after the determination of that

[ \*34 ]

estate," words which necessarily excluded the devise to the son-in-law, which he had before made by his first codicil. This argument therefore does not seem to turn upon the question whether the life estate to the widow is revoked or not. Upon the whole, although these and perhaps other difficulties may be urged against the construction above proposed, we think the *onus probandi* of shewing that the devise to the wife is included in the clause of partial revocation is cast upon those who claim under such revocation, and that it is not shewn with sufficient certainty that this devise to the wife is included in such clause; on the contrary, that upon the proper construction of this codicil the intention appears to have been that the devise to the wife should not be revoked by the codicils. Upon these grounds we think the devise in question has not been revoked.

HEARLE  
v.  
HICKS.

The LORD CHANCELLOR expressed his concurrence with the opinion of the Judges, and moved that the judgment of the Court of Exchequer Chamber be affirmed; and it was

*Affirmed accordingly.*

#### APPEAL FROM THE COURT OF EXCHEQUER.

#### GARDINER v. SIMMONS (1).

(1 Clark & Finnelly, 35—38; S. C. 6 Bligh (N. S.) 60.)

If the appellant does not appear to support his appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the House will afterwards exercise their discretion as to the costs.

1832.  
June 21.  
Lord  
BROUGHAM,  
L.C.  
[ 35 ]

THIS was an appeal from an order of the Court of Exchequer arising out of the following circumstances: The defendant was a farmer, holding certain lands in the parish of Lindfield, in the county of Sussex, and, in the month of June, 1825, was made a defendant in an amended bill, filed by one John Henry Nainby, against several holders of land in that parish, praying for an account of the tithes of their lands. The respondent appeared and put in his answer; and by an order of the Court in July, 1827, the bill was ordered, as against the respondent, to be dismissed with costs for want of prosecution, unless cause should be shewn to the contrary at the sittings after the then Trinity

(1) Cp. *Ex parte Lows* (1877) 7 Ch. Div. 160, a case in the Court of Appeal.

GARDINER  
r.  
SIMMONS.

Term. Cause was not shewn, and the bill being accordingly dismissed, the respondent's costs were afterwards taxed at 32*l.* 17*s.* These costs were not paid; and the respondent finally obtained an order, on the 7th May, 1828, directing a writ of sequestration to issue to sequester the said J. H. Nainby's personal estate, and the rents, issues and profits of his real estate, for payment of the same. The writ was accordingly issued: but the appellant, having put in a claim as lessee of all the tithes of Lindfield, the sequestrators \*served him with notice thereof, and required him to pay them all sums of money that might be due from him to the said J. H. Nainby. On proof of this service, and of demand of payment, the Court, on the 20th November, 1829, ordered that the appellant, within a week, should shew cause why he should not attorn as tenant to the commissioners under the sequestration, and why he should not pay to them the sum mentioned in the writ, and the costs of the sequestration, and of that application. The appellant shewed cause against this order on affidavits, stating that he was tenant to one Maria Williamson, and not to J. H. Nainby. The Court, by an order dated the 16th December, 1829, referred it to the Master, to inquire whether, at the time of the service of the writ of sequestration, the tithes belonged to Nainby; and directed that Maria Williamson should be at liberty to come in and be examined upon her claim of interest; that all parties should produce all books and papers relating to the inquiry, and be examined on interrogatories as the Master should direct; and that the Master should make his report to the Court. From the orders of 20th November and 16th December, 1829, the appellant appealed, alleging, that supposing him to have been lessee of the tithes to Nainby, yet that any money payment reserved in respect of such demise was not a rent, but only a sum of money due on a special contract, and therefore a mere chose in action which could not be rendered available to a sequestration: that such money, due at the time of the service of notice of the sequestration, would not run with the land to an heir or subsequent purchaser, and therefore could not be made the subject of an attornment; and that the question of fact raised by the affidavits on shewing cause, being, whether the appellant was lessee of the tithes \*to Nainby, and not to

[ \*36 ]

[ \*37 ]

whom those tithes belonged, the latter question had been improperly referred to the Master. The respondent insisted that the order was in all respects conformable to the established practice of courts of equity, in cases where third persons were in possession of property belonging to parties whose property was amenable to the process of those Courts; that the rent of tithes might be made available to sequestration; and that the supposed alienation of the tithes by Nainby was collusive, and made with a view to defeat the sequestration.

GARDINER  
v.  
SIMMONS.

The case was fixed for argument on the 21st June, 1832; on that day *Sir E. Sugden* appeared at the bar on behalf of the respondent, but no counsel attended for the appellant.

The LORD CHANCELLOR inquired into the cause of this circumstance.

A gentleman, who appeared as agent for the appellant, said he had received a notice of this case so late on the preceding evening, that he had not been able, though after using every exertion, to obtain the attendance of his counsel. He requested that some delay might be permitted.

*Sir E. Sugden* consented, on condition that the costs of the day were paid. As this condition was not accepted,

The LORD CHANCELLOR asked if the respondent's counsel would go on with the argument in support of the judgment of the Court below, and move that the appeal be dismissed.

*Sir E. Sugden* declined to do so, observing that the judgment was a good judgment, and wanted no support. \*If the appellant's counsel had appeared, he should be ready to answer anything that might be advanced against the judgment, but as nothing was advanced against the judgment, it stood on its own merits, and their Lordships might do as they thought fit with the petition of appeal.

[ \*38 ]

THE LORD CHANCELLOR :

The course which I shall recommend to the adoption of your Lordships, is to dismiss this appeal, and to state in the order that

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v.  
SIMMONS.

the dismissal is for the want of the appearance of the appellant, and that you will reserve to him the liberty of making an application to your Lordships, if he has any special circumstances to shew on which he can ground such application. In the meantime, however, I should propose to dismiss the appeal for the want of the appearance of the party; and, having regard to the peculiar circumstances disclosed upon the case, I should propose doing so with 100*l.* costs. His Lordship, however, afterwards added: Instead of dismissing the appeal with costs, I should propose that an account of the costs incurred on the part of the respondent be given in, and then, if the appellant thinks fit to make any application to your Lordships, we may determine on what conditions alone we can listen to it.

In a subsequent case, where the same question arose, their Lordships referred to this case as the precedent they should follow under similar circumstances.

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APPEAL FROM THE ROLLS COURT.

NICOL *v.* VAUGHAN.

(1 Clark & Finnelly, 49—59; S. C. 6 Bligh (N. S.) 104.)

[SEE the report of the previous appeal in this case, in 35 R. R. at p. 60, taken from 5 Bligh (N. S.) 505, at the end of which report a note of this appeal will be found: 35 R. R. at p. 67.]

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APPEAL FROM THE ROLLS COURT.

COCKERELL *v.* CHOLMELEY (1).

(1 Clark & Finnelly, 60—71; S. C. 6 Bligh (N. S.) 120; affirming 1 Russ. & My. 418.)

A testator, by his will, devised his lands to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life, without impeachment of waste, was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect recited that the trustees had sold the lands for a certain sum, and that the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase money of the estate was paid to the trustees,

(1) See now 22 & 23 Vict. c. 35, s. 13, by which the Court is enabled to remedy a mistake of this kind in future. — O.A.S.

1830.  
March 17.  
LEACH, M.R.

1832.  
July 23.

Lord  
BROUGHAM,  
L.C.  
[ 60 ]

and invested according to the directions in the will; the value of the timber was paid to the tenant for life: Held, that this was a bad execution of the power, and that it was not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him.

COCKERELL  
v.  
CHOLMELEY.

SIR HENRY ENGLEFIELD, late of the parish of Sonning, in the county of Berks, Bart., being seized of the manor of Early, and the manor, mansion-house, and lands of White Knights, in that county, made his last will and testament in writing, dated the 27th of November, 1778, and executed so as to convey real estates, and, amongst other things, devised the said manor of Early, and his manor and mansion-house \*called White Knights, and all and every his messuages, lands, &c. in the county of Berks, unto the Right Honourable Charles Sloane, Lord Cadogan, and Sir Charles Bucke, Bart., and their heirs, upon trust to secure to his widow an annuity of 500*l.* per annum, then to the use of the testator's eldest son, Henry Charles Englefield, for and during the term of his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, created in favour of Francis Michael Englefield, the testator's second son, and of Teresa Anne Englefield, his daughter. And the said testator declared his will to be, that notwithstanding any of the estates and uses by his said will created or limited, it should be lawful to and for the said Lord Cadogan and Sir Charles Bucke, or the survivor, from time to time, at the request and by the direction or appointment of the person who, for the time being, should be in possession of or entitled to the rents and profits of the manor and tenements aforesaid, signified by any deed or writing under seal, attested by two witnesses, to sell, or to convey in exchange for other manors, lands, &c. all or any part or parts of the manor and tenements aforesaid, to any person or persons whomsoever, either together or in parcels, for such price in money, or any other equivalent, as to them should seem just and reasonable; and to that end for the said Lord Cadogan and Sir Charles Bucke, or the survivor, by any deed under their hands and seals, to declare such new uses as should be necessary for the executing such sales or exchanges; and when any of the said premises should be sold for a valuable consideration in money, in pursuance of the powers thereby given, all the sums

[ \*61 ]

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 CHOLMELEY.  
 [ \*62 ]

of money which should arise by such sales should be laid out by the said Lord Cadogan and Sir Charles \*Bucke, or the survivor, with such consent as aforesaid, testified as aforesaid, and be invested in the purchase of other freehold manors of inheritance, in fee simple, in possession, and of copyhold lands of inheritance, if any should be intermixed therewith, to be settled and conveyed to the same uses as were thereinbefore limited.

The testator died on the 1st of June, 1780, without revoking or altering his will ; Dame Katherine Englefield and all his three children survived him : upon his death his eldest son, Henry Charles Englefield, who thereupon became Sir Henry Charles Englefield, Bart., entered into the possession of the manor, mansion-house and lands of White Knights, as tenant for life, under the limitations of his father's will.

On the 1st January, 1782, Sir Charles Bucke died, and Lord Cadogan became the sole trustee under the will.

In the same year, Teresa Anne Englefield intermarried with Francis Cholmeley, late of Bransby, in the county of York, esq., deceased, and the respondent, Francis Cholmeley, was the eldest son of that marriage, and was born some time in the year 1783.

In the month of July, 1782, William Byam Martin, Esq., being desirous of purchasing the manor and mansion-house and lands of White Knights, employed the late Mr. Cockerell, then of Stratton Street, an architect and surveyor, to make inquiries about the property, and to treat for the purchase of it. Mr. Cockerell accordingly applied to the London attorney and solicitor, and the country attorney and solicitor of the Englefield family, for permission to view the house and grounds, and for information respecting the particulars of the property, and the price for which it was to be \*sold, and having viewed the property, and obtained such information as he was able, Mr. Cockerell, as the agent of Mr. Martin, finally made an offer, which the then tenant for life and the trustee agreed to accept.

The real contract between the parties being a contract for the sale and purchase of the manor, mansion-house and lands of White Knights, with the addition of lands called Foxholes, at the price of 13,400*l.*, and of the timber and other trees thereon at a price to be fixed by the valuation of two surveyors, the point

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now in dispute was, whether the respective parties and their law advisers in carrying this contract into effect had not committed a mistake. They conceived that, inasmuch as Sir Henry Charles Englefield was entitled, as tenant for life, without impeachment of waste, to cut down the timber and other trees upon the property contracted to be sold, and to sell the same when cut, and to receive for his own use the proceeds of such sale, he was therefore entitled to the value of the said timber and trees although left standing; and upon this mistake as to the rights of Sir Henry Charles Englefield as such tenant for life, the deed for carrying the above-mentioned contract into effect was framed.

That deed, instead of reciting the contract of the parties as one entire contract, contained a recital to the following effect: "Whereas the said Lord Cadogan, by virtue of the power given to him in the will (and at the request of Sir H. C. Englefield, properly testified), contracted with the said William Byam Martin for the sale of the manor, and of the mansion-house of White Knights, and of the outhouses, &c., and of the fixtures and furniture, &c., for the sum of 13,400*l.*; and the said Sir H. C. Englefield, who, as tenant for life, without impeachment of waste, is \*entitled to the timber trees standing and growing, and being on the said premises, so agreed to be sold to the said William Byam Martin, hath agreed to sell the said timber and timber trees to the said W. B. Martin, at or for the sum of 2,448*l.*"

[ \*64 ]

The sum of 2,448*l.* was paid to Sir Henry Charles Englefield, for his own use, and the sum of 13,400*l.* only was paid to and received by Lord Cadogan, as the surviving trustee under the will. The deed was duly executed by all parties, and Mr. Martin entered into possession of the property.

Part of the sum of 13,400*l.* was laid out by Lord Cadogan upon mortgage security, and the residue was invested in the purchase of Three per cent. Consolidated Bank Annuities, and proper deeds were executed by Lord Cadogan, declaring the trusts upon which he held the said trust funds.

Francis Michael Englefield died in the year 1789.

In the month of April, 1799, the sum of 13,400*l.* stood invested and secured in the following manner, that is to say, the sum of

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v.  
CHOLMELEY. 12,500*l.*, part thereof, upon mortgage of certain estates at Redgemont and Seekling, in Holderness, in the county of York, and the residue thereof, together with the proceeds of other parts of the estates devised by the said will, and sold under the said power, was invested in the sum of 4,080*l.* 11*s.* 11*d.*, Three per cent. Consolidated Bank Annuities, and then stood in the name of Lord Cadogan in the books of the Governor and Company of the Bank of England.

[ \*65 ] Part of the said sum of 4,080*l.* 11*s.* 11*d.* was, on the 1st of May, 1799, applied by Lord Cadogan, with the consent of Sir Henry Charles Englefield, in redeeming the land-tax charged upon and payable out of other parts of the estates devised by the said will, \*and the sum of 4,080*l.* 11*s.* 11*d.*, Three per cent. Consolidated Bank Annuities, was thereby reduced to the sum of 601*l.* 10*s.* 9*d.* like Annuities.

The respondent Francis Cholmeley attained twenty-one in the year 1804.

Dame Katherine Englefield died in May, 1805.

In the year 1806, doubts were suggested by Mr. Nowell, the solicitor of Sir Henry Charles Englefield, whether, inasmuch as the timber and other trees expressed to be conveyed by the deed of 12th of May, 1783, had not been severed from the land at the date of the execution of that deed, the sum of 2,448*l.* had been properly received by him; and whether he ought to retain the same; and in order to obviate any litigation which might thereafter arise by reason of such doubts, Sir Henry Charles Englefield, on the 29th of July, 1806, purchased, and transferred into the name of Lord Cadogan, the sum of 3,681*l.* 4*s.* Three per cent. Consolidated Bank Annuities, being such an amount of that stock as the sum 2,448*l.* would have produced on the 17th day of May, 1783; by this transfer the amount of Three per cent. Consols, in the name of Lord Cadogan, was increased to the sum of 4,282*l.* 14*s.* 9*d.*

About the same time a draft of a deed-poll or declaration of trust was prepared, by the directions of Sir Henry Charles Englefield, and was intended to have been executed by Lord Cadogan, for the purpose of explaining how the said sum of 4,282*l.* 14*s.* 9*d.*, Three per cent. Consols, had been produced, and

of declaring the trusts upon which the said Lord Cadogan held the same. This draft was submitted to the perusal of Lord Cadogan's solicitor, and was approved by him on his lordship's behalf; but before the deed \*was actually executed, and in the early part of the year 1807, Lord Cadogan died.

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[ \*66 ]

Teresa Anne Cholmeley, the mother of the respondent Francis Cholmeley, died in the year 1810.

The said manor, &c. by divers mesne conveyances, became vested in the appellants.

In consequence of the death of Lord Cadogan, and the lunacy of his heir-at-law, it became necessary to obtain an Act of Parliament for the appointment of trustees for the discharge of the trusts of the will, and accordingly, in May, 1819, Sir H. C. Englefield, the tenant for life in possession, and the respondent Francis Cholmeley, the next immediate remainder man in tail under the will of the said testator, Sir Henry Englefield, petitioned for leave to bring in a bill for the purpose of appointing new trustees of the said will; and an Act of Parliament was passed, whereby, after reciting the will of Sir Henry Englefield, and the sale of the said manor, mansion-house and lands of White Knights, in pursuance of the trusts thereof, all the estates devised by the will, except such as had been sold, were vested in William Cruise and Edward Jerningham, both of Lincoln's Inn, esquires, and their heirs, upon the trusts of the said will; and the executors of Lord Cadogan were empowered and directed to assign and transfer unto and into the names of William Cruise and Edward Jerningham, the sum of 12,500*l.*, secured on mortgage, and also the sum of 4,282*l.* 14*s.* 9*d.* Three per cent. Consolidated Bank Annuities, then standing in the name of the said Lord Cadogan, to be held by them upon such of the trusts of the will as were then subsisting.

By a decree of the Court of Chancery made in a cause depending there, wherein some of the appellants \*were plaintiffs, and others were defendants, dated the 6th of April, 1821, it was ordered and decreed that the said manor, mansion-house and premises should be sold, with the approbation of one of the Masters of the said Court, and with the usual directions for that purpose; and in pursuance of the said decree, the said manor, mansion-house and

[ \*67 ]

COCKERELL premises were, on the 16th of July, 1822, put up to sale by public  
 v. auction, before the said Master, and the appellant, Sir Charles  
 CHOLMELEY. Richard Blunt, was allowed and reported by the said Master as  
 the highest bidder for, and the purchaser of, the said manor,  
 mansion-house and premises, at the price of 37,000*l.*, and upon  
 the terms contained in the conditions annexed to the particulars  
 of sale. The report was confirmed by an order of the 6th  
 November, 1822.

In the month of March, 1822, Sir Henry Charles Englefield  
 died, and respondent thereupon became entitled, as the tenant in  
 tail, to the possession of the hereditaments devised by Sir Henry  
 Englefield's will, or to the proceeds of such of the said heredita-  
 ments as had been sold in pursuance of the said power of sale ;  
 and as such tenant in tail he presented a petition to the then  
 Master of the Rolls, praying that William Cruise, the surviving  
 trustee under the said Act of Parliament, might be ordered to  
 assign and transfer to him the sums of which he stood possessed  
 under the trust ; and that petition having been heard before the  
 late Sir Thomas Plomer, on the 29th of July, 1822, his Honour  
 ordered that it should be referred to one of the Masters, to  
 inquire and state to the Court whether the respondent was entitled  
 to receive the said sums under the provisions of Lord Eldon's  
 Act. The Master reported that he was so \*entitled ; and the  
 order for the transfer was accordingly made.

[ \*68 ]

The respondent, Francis Cholmeley, as tenant in tail, com-  
 menced his action of formedon in the Court of Common Pleas at  
 Westminster, in Michaelmas Term, 1823, demanding against the  
 appellants the said manor, mansion-house and premises, and  
 recovered judgment in such action, upon the ground that the  
 deed of the 12th of May, 1783, was void at law, and that no estate  
 or interest in the said manor, mansion and premises, was thereby  
 limited or appointed to the said William Byam Martin.

In Hilary Term, 1826, the appellants exhibited their bill in  
 Chancery, which was afterwards amended against the respondent,  
 and, after stating the above facts, concluded by praying that it  
 might be declared that the appellants were, under the circum-  
 stances, entitled to the benefit of the contract and agreement for  
 the purchase of the said manor, mansion-house and premises, and

to have the said contract carried into effect, and to have the said indenture of the 12th day of May, 1783, reformed and amended, and made conformable to the said contract and agreement, and to have the said mistake and defect in the said last-mentioned deed rectified and made good, and that the respondent Francis Cholmeley might be decreed to do and execute all necessary and requisite acts and deeds for confirming and establishing the appellants' title to the hereditaments and premises mentioned and comprised in, and intended or expressed to be limited and conveyed by, the said indenture of the 12th day of May, 1783, and for general relief.

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To this bill the respondent put in his answer ; and \*thereby insisted, that the execution of the power of sale, by the indenture of the 12th of May, 1783, was void at law ; and that the appellants were not entitled to any relief in a court of equity against him, and were not entitled to have remedied, or made good, any defect in the manner in which the sale to Mr. Martin had been carried into effect.

[ \*69 ]

The cause came on to be heard before his Honour the Master of the Rolls on the 17th of March, 1830, [as reported in 1 Russell & Mylne, p. 418, when his Honour decreed that the appellants' bill should be dismissed, saying :]

This is one of the most unfortunate cases that ever occurred in a court of justice. The parties concerned in the transaction complained of, acted with the most perfect fairness and integrity, and, after an enjoyment has been had under it of nearly half a century, and after a transmission of interests to other persons, and great improvements, so that the property has become more than doubled in value, it is sought to be recovered upon the restoration only of the original price. And it must be observed that the transaction at the time worked no injury to the defendant. It is not pretended that full justice was not done to his contingent interest in the price paid ; and where all was just in substance, he comes into Court and claims the property upon a mere mistake of form. But the law is with him ; and in the exercise of the jurisdiction of a court of equity, I am fettered by precedent.

[ 1 R. & My.  
424 ]

The plaintiffs call upon this Court to supply the defect in the execution of the power, or to reform and amend the deed of the 12th of May, 1783. A court of equity will, in favour of persons

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standing in the situation of the plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will. But here it is at law decided, that there was no power in the trustees to sell the land without the growing timber, and there is no execution by the trustees of the power to sell the land with the growing timber ; and I find no authority which applies to this case.

[ 425 ]

With respect to the reformation of the deed, it is true that a court of equity will, in favour of persons standing in the situation of the plaintiffs, relieve against a deed, \*which, by mistake of the drawer, does not effectuate the real intention of the parties. But can it be said that the drawer of this deed has mistaken the real intention of the parties? Can it be said, that it was not the real intention of Sir Henry Englefield to convey the timber, and to receive the price, when he did actually convey the timber, and did receive the money, and retain it for some years? Or can it be said that the trustee did not mean to convey the land alone, without the timber, when he receives the price of the land alone, and permits Sir Henry Englefield to receive the price of the timber? And on the other hand, must it not have been the intention of Sir Byam Martin to take the timber by the conveyance from Sir Henry Englefield, and to take the land alone by the conveyance from the trustee, when he paid to the first the price of the timber, and to the trustee the price of the land only?

It has been argued, that the defendant, being aware of the facts of the case in the lifetime of Sir Henry Englefield, has, by his silence, and by being a party to the application to Parliament, confirmed the title of the plaintiffs. In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequence in point of law ; and here there is no proof that the defendant, at the time of the acts referred to, was aware of the law on the subject, nor was it even alleged in argument.

Upon the whole, I know no precedent for a decree in favour of the plaintiffs, and consider myself bound, therefore, though

reluctantly, to dismiss the bill; but, in such a case, it must, of course, be without costs.

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CHOLMELEY.  
[ 1 Cl. & Fin.  
69 ]

From this decree the appellants appealed, alleging that it was a settled rule in courts of equity that they would supply defects in executions of powers where a valuable consideration had been paid, and where the intention of the parties had been to execute the power, and they had been mistaken only in points of form. They insisted that that rule was fairly applicable to this case, where, from the beginning, there had been no other intention than that of a *bonâ fide* execution of the power by all the parties concerned in the sale of the estates. They further contended, that if there had been any irregularity in the execution of the power, it was removed by the subsequent transfer of stock made by Sir H. C. Englefield, so that no pretence existed for saying that the remainder man had suffered any injury. On the other hand, they insisted that the parties who had for such a length of time been acting upon the sale in 1783, in the belief that it was a good and valid sale, who had besides expended large sums of money in the improvement of the estate, would be unjustly deprived of the benefit of what they had done, if that sale should now be set aside.

The respondent insisted that the construction of the power must be the same in a court of equity as in a \*court of law, and in the latter the power had already been declared to be badly executed. A court of equity would only interfere to supply deficiencies, or correct mistakes in point of form; but here the substance of the power had been disregarded in its execution, which was indeed contrary to the intention of the donor of the power.

[ \*70 ]

*Mr. Pepys and Mr. Cockerell*, for the appellants.

*Sir Edward Sugden and Mr. Lynch*, for the respondent (1).

THE LORD CHANCELLOR :

1832.  
*July 23.*

There is a very important case which I appointed to give judgment in to-day. It is a case of very great hardship—it is the case of *Cockerell and Cholmeley*, which was argued some time ago. I stated at the time, that, being impressed by the hardship of that

(1) [The names of the counsel engaged are taken from the report in 6 Bligh (N. S.).]

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case, though I certainly felt that the decree of the Court below ought to be affirmed, I should postpone advising your Lordships as to the manner in which it appeared to me it ought to be decided, until I had an opportunity of again attentively looking carefully into it, in order to see if there was any possibility of discovering means, consistently with the decided cases, consistently with the facts of the case, and consistently with the undoubted law of the case, of coming to an opposite conclusion, which attempt on my part has been in vain; and I certainly now am prepared to advise your Lordships to affirm the decree below. My Lords, when I have said I entirely agree with his Honour (from whose judgment this is an appeal) in thinking that it is one of the hardest cases, as I have already intimated to your Lordships, taking it altogether, that I have ever seen, even upon that chapter of the law,—the execution of powers—which is so fruitful at various times in cases of this description, it is fit that I should add (and it is only what I threw out at the hearing of the cause), that nothing can be more unjust than to throw any imputation \*whatever, on the other hand, against the gentleman who has taken advantage of the law of the land as it is. He is not bound to forego that advantage; he is not only not bound to forego that advantage, but, unless he be a person to whom many thousands of pounds are a matter of no importance, as regards either his own interest or the interests of his family, it would be a piece of romantic folly, in my opinion, for him to forego that advantage which the law of the land has given him. My Lords, many who have no occasion for money for their families, either from having enough of it themselves, or their families being well provided for, may afford to be generous to others; for it is pure generosity in the way to which I have referred, but no man is to be blamed for wanting the means to be thus generous. Is it possible to think of blaming any person, merely because he is not guilty of an act of romantic generosity?—an act which, in the circumstances of this respondent, Mr. Cholmeley, who is stated to be a gentleman with a family, would, in all probability, have been an act of folly disentiitling him to praise, and probably subjecting him to censure. My Lords, in the circumstances of the case, nevertheless, I shall not recommend to your Lordships to make any order in respect to costs.

[ \*71 ]

## GILES v. GROVER AND ANOTHER.

(1 Clark & Fennelly, 72—224; S. C. 6 Bligh (N. S.) 277; 9 Bing. 128; 2 Moore & Scott, 197.)

1882.

May 25.

June 25.

July 11.

Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *fi. fa.*, and shall satisfy the Crown's debt without regard to the previous execution.

THIS was an issue directed by the Court of Exchequer, in Hilary Term, 1824, with a view to determine whether the effects of Henry Fourdrinier and Thomas Nicholls, debtors of the defendants in error, were liable to seizure under an extent in aid issued at the suit of Grover and Pollard. The goods of Fourdrinier and Nicholls had already been seized by the sheriff under writs of *feri facias*, and remained in his hands unsold when the extent in aid was issued. The question was, whether the execution under the writs of *fi. fa.* was an execution executed so as to change the property, and leave nothing for the extent to operate upon, or whether the property still remained so far in the debtors as to be liable to seizure under the extent.

The case was submitted to the consideration of the Judges, who, on the 25th May and 25th June, delivered their opinions. The House of Lords took time for further consideration; and, on the 11th July, Lord TENTERDEN and the Lord Chancellor (BROUGHAM) expressed \*their concurrence with the opinion of the majority of the Judges.

PATTESON, J.  
ALDERSON, J.  
TAUNTON, J.  
VAUGHAN, B.  
GASELEE, J.  
LITTLEDALE, J.  
BAYLEY, B.  
TINDAL, Ch.J.  
Lord  
TENTERDEN.  
Lord  
BROUGHAM,  
L.C.  
[ 72 ]

[ \*73 ]

PATTESON, J. :

In this case your Lordships have propounded two questions for the opinions of the Judges. 1st, a common person brings his action against another, and obtains judgment; issues a writ of *feri facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the defendant: while the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same defendant, as debtor of a debtor of the Crown, tested after the seizure under the writ of *feri facias*, and is delivered to the said sheriff: shall this writ of extent be executed by the sheriff by extending the same goods, seizing them into the King's hands,

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and selling them to satisfy the Crown's debts, without regard to the writ of *feri facias* under which he had first seized them?

2nd, all other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid?

Upon the first question much difference of opinion has long existed, and there are conflicting decisions of the courts of law. Your Lordships therefore will not be surprised to find that the Judges have not been able to agree, and it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points; first, whether the property in the goods is so altered by the seizure of the sheriff under the *feri facias*, that the extent cannot take effect; and, secondly, whether the statute 33 Hen. VIII. c. 39, s. 74, bars the right of the Crown. As to the first point: At common law the goods of the debtor were bound from the *teste* of a writ of *feri facias* at the \*suit of a common person, as well as from the *teste* of the King's writ. This, as to common persons, is altered by the statute 29 Car. II. c. 3, s. 16 (1), since which they are bound only from the delivery of the writ of *feri facias* to the sheriff. The Crown, however, not being named in that statute, goods are still bound from the *teste* of the King's writ. But this binding, in the case both of the King and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt, *Phillips v. Thompson* (2). (Per Lord HARDWICKE, *Lowthall v. Tomkins* (3); and per Lord ELLENBOROUGH, *Payne v. Drewe* (4); and many other cases.) And even when made in market overt, in the case of the King, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed, without regard to the *teste*; but between the King and a subject, that the King's writ, though delivered last, should be preferred first, on the ground expressed by Lord Coke, *Quick's case* (5): Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet. And this also without regard to the *teste*. If,

[\*74]

(1) Repealed, 56 & 57 Vict. c. 71, s. 60.

(2) 3 Lev. 191.

(3) 2 Eq. Cas. Abr. 381.

(4) 4 East, 523, 538.

(5) 9 Co. Rep. 129 b.

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[ \*75 ]

therefore, a writ of *fiery facias* at the suit of a common person may be delivered to the sheriff, and, before any seizure made by him under that writ, a writ of extent at the suit of the King, tested after the delivery of the *fiery facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *fiery facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *fiery facias* before the writ of extent was delivered to him: what then is the effect of that seizure? \*If by it the writ of *fiery facias* is executed, if the rights of the King and the subject no longer run together, if the property in the goods be taken out of the debtor, then the writ of extent is too late, it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if the rights of the King and the subject are still conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the King's right must be preferred. It is not pretended in any of the authorities, except in some supposed loose *dicta*, that by seizure of the goods any property therein is acquired by the creditor; so far is this from being the case, that when goods were seized by the sheriff under one writ (which had been last delivered), it was held that he might sell under the writ of another creditor, which had been first delivered, but under which he had not seized: *Hutchinson v. Johnston* (1); and see *Jones v. Atherton* (2). Now if the seizure under a writ of *fiery facias* executed the writ, if it changed that property, and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was because the property was bound and altered by the delivery of the first writ, and therefore the goods could not be taken under the last, since it was held in *Payne v. Drewe* (3), that if the sheriff sell under the writ last delivered, the creditor whose writ was first delivered cannot follow the goods or their proceeds, though he has his remedy against the sheriff; and the same point had long before been determined in *Smallcomb v. Cross* (4),

(1) 1 R. R. 380 (1 T. R. 729).

(3) 4 East, 523, 532.

(2) 17 R. R. 442 (7 Taunt. 56; 2

(4) 1 Lord Ray. 251; 1 Salk. 320.

Marsh. 375).

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[ \*76 ]

and other cases. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any difference \*as to the rights of creditors under conflicting writs, any more than the *teste* of the writs does, and will not vest any property whatever in the creditor under whose writ the seizure is made, in the cases of common persons; why then should it make any difference in the case of the Crown and a subject? It is true that in one report of the case of *Wilbraham v. Snow* (1), Lord Ch. J. KELYNGE is made to say, that "the property is altered from the owner and given to the party at whose suit;" but the reporter adds a *quære*, and the other reports of the same case do not mention this supposed *dictum*. Again, in one report of *Clerk v. Withers* (2), GOULD, J. is made to refer to this supposed *dictum* of Lord Ch. J. KELYNGE; but in another report of the same case (3), GOULD, J. is made to say only that Lord Ch. J. KELYNGE held, in *Wilbraham v. Snow*, that the sheriff gained a general property by seizure; whereas the other Judges held that he gained a special property only; and POWYS, J., is made to say that the general property remained perhaps in abeyance; all which shews only the inaccuracy of the reporters or the doubtful grounds of the decision; and as a special property in the sheriff is quite sufficient ground to warrant the decision, no other ground beyond that can reasonably be taken to have been established.

[ \*77 ]

That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may after seizure, by payment, suspend the sale and stay the execution, *Rex v. Bird* (4); and have back his goods without any bill of sale or assignment from the sheriff or creditor. And again, that if the sheriff, after selling a sufficient quantity of goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor; but \*if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said that by the seizure a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the Crown from taking other-

(1) 1 Lev. 282.

(2) 2 Lord Ray. 1075.

(3) 6 Mod. 293.

(4) 2 Show. 87.

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wise than subject to those rights. It is undoubtedly true that the sheriff does by the seizure acquire a special property in the goods; he may maintain trespass or trover for them: *Wilbraham v. Snow* (1); and see *Mildmay v. Smith* (2). He is answerable to the creditor if they be rescued, and he is bound to sell them, *Clerk v. Withers* (3). But on full consideration it seems to me that this property vested in the sheriff by seizure is merely that which results from his being the appointed officer of the law, and to enable him to sell goods, and to raise the money, not that thereby the property is taken out of the debtor. The goods are in substance in *custodia legis*; the seizure made by the officer of the law is for the benefit of those who are by law entitled; it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor whilst he has the absolute dominion over the goods. It is conceded that the Crown cannot avoid an equitable mortgage: *Casperd v. Attorney-General* (4); or the lien of a factor, *Rex v. Lee* (5); or of a wharfinger, *Rex v. Humphery* (6); or a *bonâ fide* assignment in trust for creditors, *Rex v. Watson*, *Weston on Extents*, \*115; or any other similar assignment or charge, because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the Crown has a right to say that the sheriff, whilst the goods are in his hands, holds them for the benefit of any one who may have a legal charge against them as the property of the debtor. One instance apparently shewing that a *fieri facias* is executed by seizure of the goods, is that of the bankruptcy of the debtor after the seizure and before sale, in which the assignment of the commissioners does not pass the property in the goods to the assignees, although it relates back to the act of bankruptcy; and

[ \*78 ]

(1) 2 Saund. 47; 1 Sid. 438; 1 Ventris, 52; 1 Keb. 282; 1 Mod. 30; 2 Keb. 518.

(2) 2 Saund. 344.

(3) 2 Lord Ray. 1075; 6 Mod. 290;

11 Mod. 34; Salk. 322; Holt, 303, 646.

(4) 20 R. R. 671 (6 Price, 411).

(5) 20 R. R. 664 (6 Price, 369).

(6) 29 R. R. 783 (M'Clelland & Younge, 173).

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[ \*79 ]

although the words of the statute, 21 Jac. I. c. 19, s. 9, respecting the distribution of bankrupts' effects, compel creditors, upon judgment, "whereof there is no execution or extent served and executed" upon the lands or goods before the bankruptcy, to come in *puri passu* with other creditors. And even a fraction of a day is made in favour of the *fieri facias*: *Thomas v. Desanges* (1). It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of bankruptcy prevents the execution creditor from being driven to come in with the other creditors, have in effect held that by such seizure the execution is served and executed. Now it is to be observed, that at the time of the passing of the 21 Jac. I., goods were bound from the *teste* of a *fieri facias* as against the debtor's own acts; and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and \*so bound the debtor's goods, but still abstained from putting it in force till after an act of bankruptcy; which would be in conformity to the principle of the subsequent sect. 11, as to goods in the possession of the bankrupt, by consent of the true owners. Besides the goods when seized are the goods of the debtor, and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to defeat the creditor. The Courts, therefore, have construed the words in that Act as applying to a seizure, not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular Act of Parliament, with reference to the scope and object of the Act, and cannot affect the general law; and it is also to be remembered, that the Crown is not mentioned in or bound by that Act. The case of *Clerk v. Withers* (2), is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure; but no such doctrine is there laid down. The facts of the case were shortly these: an administrator recovered a judgment by default against Clerk; he sued out a *fieri facias*, and Withers, the then sheriff, seized Clerk's goods: before sale the administrator died; then Clerk sued Withers (who had gone out of office in the

(1) 2 B. & Ald. 586.

(2) 2 Lord Ray. 1072.

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meantime) to have restitution of his goods, contending, that as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator, *de bonis non*, could not, because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office: after much argument, it was held that the action would not lie, because Clerk was discharged from the debt by the seizure of the sheriff, *ad valentiam*, and \*that the sheriff, having seized in the lifetime of the plaintiff, must account to his representatives. All this is perfectly consistent with the position that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after seizure under a *feri facias* without payment of the debt.

[ \*80 ]

It is urged also, that when goods are once seized under a *feri facias*, the sheriff must go on to perfect the execution, and that even a writ of error will not operate as a *supersedeas*. The cases to establish this position are somewhat confused; but admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself.

For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the sheriff under the *feri facias* as that the extent cannot take effect.

I come now to consider what is the effect of the statute 33 Hen. VIII. c. 39, s. 74. Premising, that it appears to me somewhat doubtful whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the King's writs of execution, after judgment or award of execution obtained by him in a suit, I am of opinion, that if it does apply to such an extent as the present, it does not, under the circumstances stated, prevent its priority. That statute created certain new Courts; and it must be admitted that it gave the King some new rights, for the 50th section gives to

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[ \*81 ]

bonds made to the King the effect of statutes staple, and the 53rd section gives the King \*the same remedy on those bonds as the subject had had on statutes staple. Then, after various other matters, comes the 74th section, at a great distance; and it is this: "That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit or process shall be preferred before the suit of any person or persons; and that our sovereign Lord the King, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken or commenced, or process awarded for the said debt, at the suit of our said sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the Act. At common law, the King might by his writ of protection prevent any subject from suing his debtor at all, until the King's debt was satisfied (1). By statute 25 Edw. III. c. 19 (2), it was provided, that notwithstanding such writs of protection, the subject creditor might sue the debtor to judgment, but not have execution till the King's debt was satisfied; and if the creditor would undertake for the King's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased; and Lord Coke says, that he cannot say anything of them from his own experience, but there is no doubt that they were in use at the time of the passing 38 Hen. VIII., that Act having, by the 50th section, made bond debts to the King binding on the land of the debtor from the date of the bond, which they were not before. The 74th section seems to have been inserted \*for the benefit of the subject, primarily with a view to land, and so as to prevent the King's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the King, by putting his bond in force before such judgment obtained, had expressed his intention so to bind it. But the 74th section was also inserted, as it seems to me, with reference to the very

[ \*82 ]

(1) Co. Litt. 131 a.

(2) Repealed, S. L. R. Act, 1863.

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prerogative of the King of preventing the execution of the subject, and so having first execution himself, restricted as it was by 25 Edw. III. c. 19; and in this view it applies to all proceedings for recovery of the King's debts, and to executions against goods as well as lands; and it abridges the power of the Crown, as it has been considered to do in *The Attorney-General v. Andrew* (1), and in *Cecil's case* (2). For since the 33 Hen. VIII. the Crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the Crown process is awarded; but in that case the subject may sue out his execution, and reap the funds of it, if he can sell before the King's execution comes into the sheriff's hands. By obtaining a judgment before the Crown process is awarded, the subject entitles himself to run a race with the Crown, so to speak, which he could not do before the statute 33 Hen. VIII. nor, as I apprehend, can do even now, where he has not so obtained judgment; although, in all cases, according to *The Attorney-General v. Fort*, reported in a note to *Rex v. Giles* (3), if the Crown suffers the goods to be sold under a *fieri facias*, before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject. The statute 33 Hen. VIII. not only, as I humbly conceive, enables the subject to run a race with the Crown, in certain cases, but it leaves the issue of that race to depend on the common law maxim which I stated long ago, \**Quando jus domini regis, &c.*, which maxim is not denied, and is established by numerous cases; otherwise, if the words of the 74th section are to be taken in their literal sense, this absurd consequence, among others, would follow, that if a subject obtained a judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *fieri facias*, and deliver it to the sheriff, and so obtain priority, but that the Crown could not, as it is well put in the argument in *Rorke v. Dayrell* (4). If A. recover judgment against the King's debtor on 1st January, but do not deliver his writ of execution till the 4th, and B. also recover judgment against the same person on the 3rd, and deliver his writ on the same day, and on

[ \*83 ]

(1) Hard. 23.

(2) 7 Co. Rep. 18 b.

(3) 8 Price, 394.

(4) 2 R. R. 417 (4 T. R. 402).

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[ \*84 ]

the 2nd an extent issues at the suit of the Crown, and is delivered to the sheriff; according to the construction contended for, this absurdity would follow, that the King would not be preferred as against A., though he would as against B. And yet it must be admitted that B. is entitled to a preference against A. The literal meaning of the words of this section cannot, therefore, be adopted; nor am I able to see any construction that can reasonably be put upon the statute other than that which I have imperfectly expressed; but will be found infinitely better stated in Mr. Baron GRAHAM's judgment in this very case (1), and in Lord Chief Baron MACDONALD's judgment in *Rex v. Wells and Allnutt*, reported in a note to *Thurston v. Mills* (2). Mr. West says, in his book on Extents (3), that the statute 33 Hen. VIII. gave the Crown a new kind of execution for all its debts, a species too of execution which before the statute was the subject's, and the subject's only. This he deduces from the 50th and 53rd sections of that Act. I think that he is wrong in that view of the statute; and that the proceeding \*by extent in the first instance, at the suit of the Crown, existed long before the statute 33 Hen. VIII., and was only modified and restricted by that Act: but whether he be right or wrong is not, in my humble opinion, material; for even if he be right, I still hold that the true construction is that which I have already expressed. I will now proceed to consider some of the cases in which this question has arisen or been discussed. And first, the case of *Uppom v. Sumner* (4). The judgment was given by Justice GOULD, in Easter Term, 9 Geo. III., delivering the opinion of Lord Chief Justice DE GREY himself, NARES and BLACKSTONE, JJ.: he grounds his judgment, first, on the statute 33 Hen. VIII., as to which I have already spoken; and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringefellow's* case (5), as not having arisen on a judgment but on a statute staple, and therefore not being within the provisions of 33 Hen. VIII.; and then relies on the case of *Lechmere v. Thoroughgood* (6), and *The Attorney-General v. Andrew*, and on a passage in the Digest by

(1) 8 Price, 362.

(2) 14 R. R. 347 (16 East, 278).

(3) P. 108.

(4) 2 Bl. 1251 and 1294.

(5) Dyer, 67 b.

(6) 3 Mod. 236.

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Lord Chief Baron COMYNS, who, tit. Debt, (G. 8,) after citing 38 Hen. VIII., says, “therefore if execution be upon a judgment against the King’s debtor, and before a *venditioni exponas*, an extent comes at the King’s suit, those goods cannot be taken upon the extent,” and cites for this position the two cases just above mentioned; and GOULD, J. also mentions the case of *Rex v. Dickenson* (1). That was a question as to administration of assets, in which the point decided was that a judgment creditor of the deceased should be preferred to a simple-contract creditor, who, being a debtor to the Crown, had, after the death of the deceased, procured an extent in aid; a case wholly foreign to the question in *Uppom v. Sumner*. The authorities, \*therefore, on which Lord Chief Baron COMYNS and GOULD, J., rely, are reduced to the two before mentioned, *Lechmere v. Thorouggood*, and *The Attorney-General v. Andrew*. GOULD, J. says, that the former of these cases is obscure, arising from its being reported piecemeal, and in different books, and recommends reading them in order of time as they occur, viz. the pleadings, 2 Jac. II. (2); the first argument, 4 Jac. II. (3); the second argument and judgment, 1 W. & M. (4); and a subsequent action between the same parties, in effect, in the Common Pleas, in *Lechmere v. Toplady* (5). I have read them all in that order, and although there are some loose *dicta* and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: 1st, that in an action of trespass by assignees of a bankrupt against a sheriff, who had seized goods under a *fieri facias* after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation; this was *Lechmere v. Thorouggood*. And, 2ndly, that in an action of trover, for the same seizure, against the execution creditor, the judgment for the sheriff in the action of trespass was a good bar by way of estoppel; that was *Lechmere v. Toplady*. I do not mean to say that I at all agree to the decision on the last point; but it was the point decided, and the only point. With respect to *Lechmere v. Thorouggood* the facts were shortly these: The sheriff seized goods of one

[ \*85 ]

(1) Parker, 262.

(2) 2 Ventr. 159.

(3) 3 Mod. 236.

(4) Comb. 123; 1 Show. 12.

(5) 2 Ventr. 169; 1 Show. 146.

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[ \*86 ]

Toplady on the 29th of April, under a *fi. fa.*, after a secret act of bankruptcy, committed on the 28th of April; and whilst the goods remained in his hands unsold, viz. on the 4th of May, an extent, at the suit of the Crown against Toplady, was delivered to him. On the 5th of May a commission of bankruptcy issued \*against Toplady, under which the plaintiffs were appointed assignees, and sued the sheriff in trespass, a special verdict was found, and it was held that the action would not lie. Some of the reports say that it was held that the extent came too late, but this point could not have been determined, for the Crown was no party to the suit and was not heard; therefore no right of the Crown could be decided in it. Again, the Crown and the execution creditor were on the same side, the sheriff the defendant, having seized for both, no point therefore as between them could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided, even Comberbach so states, although he makes Lord Chief Justice HOLT say, "The property in goods is vested by the delivery of the *feri facias*, and extent afterwards for the King comes too late, and this by the Statute of Frauds and Perjuries." This must be a mistake; it is contrary to Lord HOLT's own position in *Smallcomb v. Cross* (1), it is wholly beside the question before him, and makes him consider the statute as binding on the King, who is not named in it. Lord MANSFIELD, in *Cooper v. Chitty* (2), says that Lord HOLT could never say that the property in the goods vested by the delivery of the *feri facias*, and that the extent for the King afterwards came too late; and adds, no inception of an execution can bar the Crown; and Lord ELLENBOROUGH also points out the inaccuracy of Comberbach very forcibly in *Payne v. Drewe* (3). With respect to the case of *The Attorney-General v. Andrew*, it is quite apparent from a perusal of that case that the execution, which was by *elegit*, was perfected and completed by delivery of the lands before the King's writ issued; and then, as Lord Chief Baron STEEL says, \* "the subject's title is prior to the King's,

[ \*87 ]

(1) Lord Ray. 252.

(3) 4 East, 523, 539.

(2) 1 Burr. 36.

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and is executed." The same law and the same consequences have since been held to attach in *The Attorney-General v. Fort*, and in *Swain v. Morland* (1). The two cases cited, therefore, do not bear out the position of Lord Chief Baron COMYNS, nor the decision in *Uppom v. Sumner*; and that decision must be supported, if at all, on the statute 33 Hen. VIII., on which I have already remarked. The next case is *Rorke v. Dayrell* (2). That case was decided principally on the authority of *Uppom v. Sumner* and the authorities there cited, and if they should be wrong, the decision in *Rorke v. Dayrell* is wrong also. Lord KENYON puts the case on the ground of change of property, for he says, "that as long as the property of the debtor remains unaltered, and an execution at the suit of a subject and an extent at the King's suit issue against the debtor, the title of the latter must prevail, for the point to be considered in these cases is in whom is the property." He adds, "I have always understood it to be clear and settled (and this question has very frequently occurred in the Exchequer) that if an extent at the suit of the Crown be issued prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as by common law, abridged as it is by the Statute of Frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach." Now, with all possible respect for every thing which fell from Lord KENYON, I humbly conceive that he has here confounded the binding the property in goods and the alteration of the property, and that he is mistaken in supposing that \*the property in goods is or ever was at all bound or altered either by the *teste* or delivery of the writ as regards conflicting writs, and that the binding is only as regards the debtor himself, as I have before shewn; and if so, the very foundation of his judgment fails: the other Judges put the case on the statute 33 Hen. VIII. These are the only decisions in favour of the subject's execution; for *Thurston v. Mills* (3) went off on another point. Against them are the uniform decisions of the Court of Exchequer, one of which is reported at

[ \*38 ]

(1) 21 B. R. 651 (1 Brod. &amp; B. 370).

(4 T. R. 402).

(2) 2 B. R. 417; 4 B. R. Pref. vii.

(3) 16 East, 254.

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length, viz. *Rex v. Wells and Allnutt*, in the note to *Thurston v. Mills* (1): this is subsequent to both *Uppom v. Sumner* and *Rorke v. Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word said by Lord Chief Baron MACDONALD, in giving the judgment of the Court, (some of whose positions, according to the letter, I confess appear to me untenable,) I, for one, am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *Rex v. Sloper and Allen* (2), which is still later. There are other prior cases to which I could briefly refer; and, first, *Stringefellow v. Brownsoppe* (3), which was decided Mich. T. 3 Edw. VI., seven or eight years after the 33 Hen. VIII. In that case, the sheriff seized Brownsoppe's goods under an *extendi facias* upon a statute staple, at the suit of Stringefellow, and before any writ of *liberate* the King's writ of extent came into his hands; and the Court held that the King's writ should be preferred, because the property in the goods was not in Stringefellow before they were delivered to him by writ of *liberate*. It is said that this is no authority to the present point, for that the *extendi facias* is in the nature of a judgment, and the *liberate* is the execution; therefore, as a judgment operates no change of property, so

[ \*89 ] \*neither does seizure under the King's hands under an *extendi facias*; but that as delivery under a *liberate* operates a change of property, so does seizure under a *fieri facias*. Now I cannot understand this reasoning at all; I can see that the award of an *extendi facias* may be and is analogous to a judgment, but how a seizure under it can be so, I am at a loss to comprehend. Again, I can see how delivery under a *liberate* of the specific goods to the creditor, as is always done, may be, and is analogous to sale under a *fieri facias*, which directs the sheriff to make money of the goods; but how the mere seizure into the sheriff's hands under a *fieri facias* should be analogous to a delivery over to the creditor under a *liberate*, I am at a loss to comprehend: I apprehend that seizure under an *extendi facias* is the inception of the execution, and so is seizure under a *fieri facias*; delivery under a *liberate* is the completion, and so is sale under a *fieri*

(1) 14 R. R. 347 (16 East, 278).

(3) Dyer, 67 b.

(2) 6 Price, 114.

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*facias*: the only difference is that a *liberate* must issue to enable the sheriff to deliver in the one case; whereas, in the other, he may and ought to sell without a *venditioni exponas*; but this difference cannot vary the effect of the seizure. The principle established in *Stringefellow's* case, is, in the words of Lord MANSFIELD, that no inception of an execution can bar the Crown. *Stringefellow's* case was against the opinion of some of the profession at the time, but it has been recognized as good law many times since, and seems to me to be directly in point. Next comes *Curson's* case (1), which only shews that after delivery under a *liberate*, the King's writ is too late. In *Rex v. Peck* (2), it was taken for granted that if an extent comes after seizure under a *feri facias*, and before sale, it shall be preferred. In *The Attorney-General v. Capell* (3), the point decided arose out of a bankruptcy, the King's writ being preferred after an act of bankruptcy \*and before assignment by the commissioners. It is not in point to the present question, but at the end of the judgment are these words: "Extents have been held good that have been made upon goods actually levied by virtue of a *feri facias* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." Also in *Smallcomb v. Buckingham* (4), which is the same case as is elsewhere called *Smallcomb v. Cross*, there is a *dictum* to the same effect, and many others in other places, all which *dicta* I merely notice to put them in opposition to other *dicta* as to the vesting and alteration of property by seizure. Lastly, comes the case of *Rex v. Cotton* (5); that was the case of goods seized under a distress for rent; and it was held that they were still liable to be taken under an extent at the suit of the King, though in the custody of the law, and therefore privileged from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainer, who can neither maintain trespass nor trover for them, and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in

[ \*90 ]

(1) 3 Leon. 239, and 4 Leon. 10.

(4) 5 Mod. 376.

(2) Bunb. 8.

(5) Parker, 112.

(3) 2 Show. 480.

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himself against the Crown. Now on looking at the whole of the elaborate judgment of Lord Chief Baron PARKER in that case, I do not find that he puts the case on the form of the pleadings, but on the general principle that the property is not altered, and therefore the King has preference, and throughout his judgment he cites cases as to the effect of seizure under a *fiery facias*. Proceeding upon that principle, I consider therefore that this case is a strong authority upon principle, unless it can be shewn that seizure by the sheriff alters the property, and I submit that the contrary has been shewn. It is true that neither *Stringefellow's* case nor *Rex v. Cotton*, are direct authorities with regard to the stat. 33 Hen. VIII., because in neither of them had the subject obtained judgment.

Upon the whole, then, whether with reference to the statute 33 Hen. VIII., or independent of it, the main points appear to me to be, was the property changed by the seizure, and were the King's writ and the subject's concurring? I say that the property was not changed, and that the writs were concurring. My answer, therefore, to the first question of your lordships is, that in my opinion the writ of extent shall be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debts, without regard to the writ of *fiery facias* under which he had first seized them. With regard to the second question, I find it uniformly considered that (when once it has issued) an extent in aid has all the force and all the incidents of an extent in chief, and therefore I am of opinion that all things remaining the same, it does not make any difference whether the writ of extent was in chief or in aid.

ALDERSON, J. :

My Lords, the first question proposed by your Lordships for our consideration is in substance this: Whether when goods seized by a sheriff under a writ of *fiery facias* remain in his hands unsold, a writ of immediate extent tested after such seizure, does upon its delivery to such sheriff entitle the Crown to a priority of execution; and after fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative.

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This subject has been for a long period *rexata questio* in our Courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert in the outset to the extent \*of the prerogative of the Crown as to its debts, and the principles on which that prerogative depends, and then to proceed to examine the authorities and the reasons assigned for those determinations, which are to be found in our books on this point.

The prerogative of the Crown as to its debts is laid down in various books, and cannot, I apprehend, be doubted. Lord Coke in *Harbert's* case (1) states "that at the common law the body, land and the goods of the accountant or the King's debtor, were liable to the King's execution;" and he adds, that there were "infinite precedents in the Exchequer" to prove this, antecedent to the 33 Hen. VIII. c. 39. Lord Chief Baron GILBERT also, in his *History of the Exchequer*, lays it down that the second summons of the pipe is "in the nature of a *levari facias* against the body, lands and goods of the debtor." And in Lord Hobart's Reports, *Foster v. Jackson* (2), the law is very clearly laid down thus: "It is a prerogative to the King to have execution of body, lands and goods; not communicated to the subject but in case of statute merchant and statute staple, and recognizance of that nature; which is by the statute law; and therefore the case put in *Bloomfield's* case, that where the party was taken in execution upon a statute and died, and yet execution was had against goods and lands after, is nothing in this case, for they were all due at the first, and therefore may be taken at once or severally."

[ \*93 ]

And in Maddox's *History of the Exchequer*, Vol. II. p. 183, and subsequent pages, a great variety of instances confirmatory of this passage of Lord Hobart, in all its parts, will be found. I have cited this passage from Lord Hobart at full length, because I shall have occasion again to refer to it in considering the \*true construction which ought to be put on the statute 33 Hen. VIII., and because I think it will be found to afford a sufficient clue to enable us to discover what was the real change in the law produced by that statute as to the prerogative of the Crown.

It is unnecessary to cite other authorities on this subject.

(1) 3 Co. Rep. 11.

(2) Hob. 60.

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The result of them all being, as I conceive, that the King at common law by his prerogative could either by one writ or by successive writs, as he might find it convenient, seize the body, lands and goods of his debtor. And further that this was originally a prerogative peculiar to the Crown, but afterwards extended to the subject; viz. as to the body of the debtor by the Statute of Marlebridge, c. 23, the Statute Westminster 2, c. 11 (1), and the statute 25 Edw. III., and to the lands by the Statute Westminster 2, c. 18, and in the cases of statute merchant and statute staple, and recognizance in nature of statute staple by 13 Edw. I., 27 Edw. III., and 23 Hen. VIII. c. 6 (2), to the body, lands and goods.

The next prerogative of the Crown about which I apprehend there is no dispute, is, that where the right of the Crown and the subject concur, that of the Crown is to be preferred (3). A prerogative depending, first, on the principle that no *laches* is to be imputed to the King, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue (4); and, secondly, on the ground that by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord Coke, *Thesaurus Regis est firmamentum pacis: et fundamentum belli*.

[ \*94 ]

And, until restrained by various enactments of the \*statute law, this prerogative extended to prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects, without special leave first obtained from the Crown.

But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has

(1) Repealed, 32 & 33 Vict. c. 83, s. 20.

(2) Repealed, S. L. R. Act, 1863.

(3) 9 Co. Rep. 129 b.

(4) Gilb. Hist. Exch. 110.

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prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail. Lord MANSFIELD expresses this proposition in shorter language when he says, “no inception of an execution can bar the Crown:” *Cooper v. Chitty* (1).

Now if we proceed to apply these principles to the determination of the present case it will appear that the material facts are these: I. S. has obtained judgment against a Crown debtor, has issued a *feri facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the Crown debtor. The question, then, is this: Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there any further act to be done in order to make that right consummate? The most simple criterion of this \*seems to be, whether without any thing further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods, or to pay him the debts. Now, I do not believe that it was ever contended, that the execution creditor is entitled to the possession of the goods themselves, unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized *ad valentiam*, to pay him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require the sheriff afterwards to proceed to a sale by the writ of *renditioni exponas*. In fact, it is clear that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the Courts. There are many authorities founded on this principle, which shew that a seizure of goods *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods, after seizure, are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused, where the execution fails altogether without his fault. And in that case, according to the

[ \*95 ]

(1) 1 Burr. 36.

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doctrine laid down in *Foster v. Jackson* (1), by Lord HOBART, the creditor may have a fresh writ of *fi. fa.* and the loss falls on the debtor. There is a third criterion, which is this, that the debtor on tendering the amount for which the levy is made, and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff. From these premises, two propositions seem to me to follow: 1st, that at no period of time does the execution creditor obtain any property whatever in the goods themselves; and, 2ndly, that the general property in the goods \*seized remains until the sale, in the debtor, and is not changed by the seizure: *Milton v. Eldrington* (2). After the sale the case is very different, for by the sale the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor, for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged: *Parkinson v. Guilford* (3). The rule is thus expressly laid down by Mr. Baron GARROW, in delivering the opinion of the Court, after full consideration of the case of *Higgins v. M'Adam* (4). "The rule is that when execution is executed, the property is changed, and execution is said to be executed when a sale has taken place." It is not, therefore, till after the sale that the right of the execution creditor becomes consummate, and it would follow from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the Crown. If, therefore, the right of the Crown arises at any period prior to the sale, it seems to me that on the principles above laid down, it ought to have the preference. A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognized by the Court of King's Bench, in *Hutchinson v. Johnston* (5). That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him, but before sale, having discovered that another writ, which was entitled to priority, had been first delivered to him, he made the

(1) Hob. 60.

(2) Dyer, 98 b.

(3) Cro. Car. 539.

(4) 3 Younge & J. 1.

(5) 1 R. R. 380 (1 T. R. 729).

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[ \*97 ]

sale under it, and paid the surplus only, to the creditor under the second writ, under which he had originally seized the goods. And the Court expressly decided, that until sale he had a \*right so to do; but after sale, not; *Rybot v. Peckham*, cited in the note (1), being an express authority to that effect. And it is observable that many of the authorities which are relied on in the present case were then cited, in particular the case of *Clerk v. Withers* (2); and the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, namely, that till sale the extent prevails over the prior execution; and I apprehend that prior to the Statute of Frauds, if a subject's writ of execution had come to the sheriff after seizure but before sale, under a writ of a subsequent *teste*, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. These authorities seem to me to shew clearly, first, that no property passes by the seizure from the original debtor to the creditor; and secondly, that even in the case of conflicting rights, as between subject and subject, the point of time to which the Courts uniformly look as the period when the execution is consummate, is not the seizure, but the sale under the writ. There is one case, however, which requires some observation, as it would seem to trench upon this proposition: I allude to the construction put by the Courts upon the 9th section of the 21 Jac. I. c. 19 (3). There is no doubt that the Courts have held that the seizure under a writ of *fi. fa.* was sufficient to satisfy the words "execution or extent served and executed," contained in this statute, and that, for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the \*peculiar objects of the Legislature. It is to be observed, first, that it was prior to the Statute of Frauds; the law, therefore, then was, that writs of *fi. fa.* bound the debtor's property, as to all persons claiming under him, from

[ \*98 ]

(1) 1 R. R. 382, n. (1 T. R. 731).

(2) Salk. 322.

(3) Repealed, 6 Geo. IV. c. 16.

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the *teste* of the writ, and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fi. fa.*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the 11th section, in cases where the bankrupt was the reputed owner of another's goods. It was probably, therefore, with that view that this clause was introduced, providing that such writs should not bind, as against those who claimed under the bankrupt, from their *teste*, but only from the date of the public act done by the sheriff, in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period. The present case, however, depends on the question whether the property is changed, and, until sale, this is not the case; the execution is not complete, so as to transfer the property, until that period. But it is urged, and a great portion of the argument at the Bar turned upon it, that although it may be that the execution creditor has no consummate right till after sale, and although the general property in the goods remains until the sale with the debtor, yet that the sheriff has a special property in him from the time of the seizure, and that the Crown, in the event of the *teste* of the extent being subsequent to the seizure, must take the goods subject to that special property. There is no doubt that a variety of authorities may be cited, establishing as clear law, that the Crown must take subject to a special property created by the act of the party. In the case of the factor, *Rex v. Lee* (1), it was held, that goods in his \*hands, on which he had a lien for his advance made before the *teste* of the extent, could only be taken by the Crown subject to that lien. So, again, in the case of goods pawned or pledged before the *teste* of the extent, *Rex v. Cotton* (2), and in the case of *Rex v. Humphery* (3), the same law prevails. In *Casperd v. Attorney-General* (4), an equitable mortgage created before the party creating it became a debtor to the Crown on record, was in like manner held to be valid against a subsequent extent. But I can find no instance whatever, nor do I believe

[ \*99 ]

(1) 20 R. R. 664 (6 Price, 369).

Younge, 173).

(2) Parker, 112.

(4) 20 R. R. 671 (6 Price, 411).

(3) 29 R. R. 783 (M'Clelland &

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that any such exists, where a special property, not created by contract between the Crown debtor and the person setting it up, or between the Crown debtor and some one under whom such person claims, has been ever allowed to prevail; and I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he becomes a Crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale ought to be allowed to make any contract short of that, which shall also be valid; he may, therefore, make a valid pledge. The right of the other party is consummate by the act of pledging or of sale; but the cases of a distress for rent before sale, a seizure by the messenger under a commission of bankrupt, and the case now in judgment, are very different. There the goods are all taken by an adverse proceeding from the Crown debtor, and are all under the custody of the law at the time the extent is put in; the creditor's right is but in progress, and the sheriff, the commissioners of bankrupt, and the distrainer, are real officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of \*those who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is, that it is in the custody of the law; whereas, in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself having a beneficial interest under a valid contract. Lord Chief Baron GILBERT, speaking of lands (and the principle is the same as applied to goods, although the charge takes effect at a different period), says, that nothing can hinder the King's charge but what amounts to a precedent alienation; and a *liberate* in pursuance of a previous judgment amounts to an alienation of the land; and yet before the *liberate* there is a seizure of the land by a public officer, for the purpose of its being by the *liberate* alienated to the creditor. By the seizure the land is taken into the custody of the law, by the *liberate* it is alienated to the creditor, and from the date of the latter the right of the Crown is ousted. I am aware of the various cases and authorities that exist in which it has been determined that

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trover will lie by a sheriff after seizure of goods under a *fi. fa.*, and I do not dispute the proposition that this shews that the sheriff has for some purposes a special property in the goods so seized. But it seems to me that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in *custodia legis*, and the special property of the sheriff is given to him that this *custodia legis* may be rendered safe. If, then, it be true, as many cases have determined, and in particular *Rex v. Cotton* (1), that goods in *custodia legis* are in a situation in which the Crown's right and that of the subject may come in conflict, I do \*not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the Crown, or whether it is only in progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject, having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the goods seized under a subsequent writ, as in *Hutchinson v. Johnston* (2); or if, as in the present case, the Crown's extent comes in before sale, he holds for the Crown. I have hitherto considered this as if it were *res integra*; but I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringefellow's* case (3); and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognized as good law by Lord HOBART, in *Sheffield v. Ratcliffe* (4); by Lord ROLLE, in his Abridgment; by Lord HARDWICKE and the two Chief Justices, RYDER and WILLES, in *Rex v. Cotton*; and by the Courts of Common Pleas and King's Bench, in *Uppom v. Sumner*, and *Rorke v. Dayrell*. I do not think it necessary to add the various cases in the Exchequer on this point. It is,

(1) Parker, 112.

(2) 1 R. R. 380 (1 T. R. 729).

(3) Dyer, 67 b.

(4) Hob. 339.

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however, contended that *Stringefellow's* case is distinguishable, and undoubtedly it is so, in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, namely, the award of the *liberate*. And it is said by Mr. Baron Wood (1), that the *liberate* and the *fi. fa.* are equivalent to each other; but I think that proceeds on a misstatement \*of the true point in the case. The right vested by the *liberate* in the creditor is to have the identical lands and the identical goods delivered to him; the creditor's right is therefore consummate by the *liberate*. But the *fi. fa.* does not command the sheriff to seize and deliver the goods to the creditor (in which case the *fi. fa.* and seizure would be equivalent to the *liberate* after the previous seizure), but in substance it commands him to seize and sell, and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation, with respect to the creditor, as the *liberate* under an extent; for by the act of sale the creditor has vested in him a consummate right to the produce of the sale. Now *Stringefellow's* case clearly decides that until the *liberate* the lands and goods seized, and in the hands of the sheriff, remain liable to the Crown process: that case, therefore, appears to me in principle to have decided that until the creditor obtains a consummate right, the Crown's rights are not ousted, and so to govern the present case. The case of *Rex v. Cotton* is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find, that although the point now before your Lordships was there treated as the proposition, and that case as the corollary, it should now be contended, that although *Rex v. Cotton* is good law, still the proposition from which that case was in truth only a corollary, cannot be supported. The principle there laid down clearly was, that goods in *custodia legis* continued liable to an extent until the period arrived at which some person other than the \*original debtor had acquired a consummate right in them; and the

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[ \*103 ]

(1) 8 Price, 318.

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Court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to those great men who decided that case. The reason why the expressions as to special property are there introduced, seems to me obvious enough: the distress is in the custody of the creditor himself, and therefore it might have been plausibly enough contended, that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court, looking to the substance and not to the form, decide that in seizing he acted as an officer of the law; that he held as such, and that the goods were not really in his possession, but in the custody of the law, they having come to him by a special authority given by the law, and not by the act of the party, as in the case of a pledge or the like, and the consequence being that no property, nor even any possession *in jure*, passed to him. This case seems to me to be *à fortiori* to the present case. I proceed to enumerate shortly the other cases, in which the law has been laid down in the same way. In *Rex v. Peck* (1), the reporter says it was taken for granted that the law was so. In *The Attorney-General v. Andrew* (2), it is not indeed distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the Crown commenced, but I think it can hardly be doubted that he had; for there Lord Chief Baron STEEL observes, that the subject's title is "prior to the Crown's, and is executed." Now it appears from *Empson v. Bathurst* (3), that until the *liberate* no fee is due to the sheriff, because the execution is not executed. I think this explains the language \*of Lord Chief Baron STEEL, and makes it consistent with what he adds, that "*Stringefellow's* case is unanswerable." In the case of *The Attorney-General v. Capell* (4), it is stated that "although the goods were actually in *custodia legis*, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This

[ \*104 ]

(1) Bunb. 8. (2) Hard. 23. (3) Hutton, 52. (4) 2 Show. 482.

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latter passage Mr. Baron Wood (who omits the former part of the Report) calls "a note of the reporter, unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment. The case of *Lechmere v. Thoroughgood* has been much relied on by the other side; but I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right, and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the Crown was executed before any assignment under the bankruptcy had been made; so that, according to all the authorities, the plaintiffs had no ground of action; and the execution and the extent being set up by the same parties, no question of priority *inter se* could well have arisen. Again, the writ of *fi. fa.* was issued before the sheriff had notice of the bankruptcy; and as the action was trespass, the Court, on that ground, might well decide in his favour. The *dictum* attributed to Lord Holt, that "the King's prerogative had been taken away by the Statute of Frauds," cannot be supposed to have really fallen from that learned Judge: and yet this case, although thus questionable in its application to the present subject, has been one of the main grounds \*on which the two principal authorities on the other side, *Uppom v. Sumner*, and *Rorke v. Dayrell*, have been decided. The case of *Clerk v. Withers* seems also to me to be wholly inapplicable to the present question; indeed, like *Lechmere v. Thoroughgood*, it is only to be cited for certain *dicta* of the Court as to the execution being complete by the seizure, for the decision itself is clear enough. It was there argued, that the death of the creditor, after seizure under the *feri facias*, did not give to the debtor the right of recovering back his goods from the sheriff. And the Court held that it did not; for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the *fi. fa.*; and therefore the death was immaterial to the purpose. But, secondly, the levy under the writ was pleadable in bar to another action for the same debt; so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true that after the award of the *fi. fa.*, and before seizure, the same result would

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follow : *Thorougood's* case<sup>(1)</sup>, cited by GOULD, J., in giving his judgment. Now it is not pretended that an award of *fi. fa.* would bar the Crown before seizure ; the principles, therefore, of that decision are wholly inapplicable to this question. There are some *dicta* in that case, certainly, which may be relied on ; but I think that if they are read, as all such *dicta* ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution creditor and the assignees of a bankrupt. It was not so in all cases, however, even between subject and subject, \*as appears from *Hutchinson v. Johnstone* ; and I think it is not so *à multo fortiori* in a case between the subject and the Crown, which has a prerogative peculiar to itself of interposing *in medio*. *Curson's* case<sup>(1)</sup> is still less applicable ; it depends on a totally different principle. There *Curson* acknowledged a statute to Starkey, and afterwards another to J. S., who assigned to the Crown : the liability, therefore, on which the Crown proceeded was created subsequently to that to Starkey. After this, Starkey obtained possession under his execution ; and it was held that the debt to the Crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed also, that this case is within the stat. Hen. VIII. ; for the judgment was prior to the King's debt, and the execution was consummate before the King's extent. Lord Chief Baron GILBERT (p. 94) gives this reason for it ; for he says " the creditor Starkey did not by the *liberate* take the land *sub onere* of the King's debt, because his lien was antecedent to it ; and it were repugnant to construe him to take the land *sub onere* of the King's debt, when he took it in satisfaction of a debt precedent." So again, on the same principle, it has been held that if A. infeoff B. of his lands, after a judgment confessed by him to C., the Crown, as assignee of C., cannot take more than C. could, viz. a moiety of the land ; although, no doubt, if the judgment had been confessed to the Crown originally, the Crown could have taken the whole. In fact, it depends on the

(1) Noy, 73.

(2) 3 Leon. 239.

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principle that where the law allows a party to contract, it will not permit that contract, by any matter arising *ex post facto*, to be made of no value: a principle to which I have before referred, in distinguishing goods on which there is a lien by contract from goods in the custody \*of the law. The case of *Uppom v. Sumner*, which is the leading authority on the other side, would, I think, be entitled to much greater weight if it had not proceeded a good deal on the case of *Lechmere v. Thorougood*. Even taking the different reports of that case in the way suggested by Mr. Justice GOULD, no great advantage as to clearness can be derived; and I cannot help thinking that the better course would have been to have placed no great reliance on a case in which a part was to be picked up from one reporter, and a part from another, in order to make something like a connected account, instead of attributing the confusion to the most obvious and natural cause, viz. the inaccuracy of the reporter. The same observation applies to the case of *Rorke v. Dayrell*; the Court there also relied a good deal on *Lechmere v. Thorougood*. I shall not at present refer to the main ground on which both these cases proceed, viz. the statute of Hen. VIII., because I proceed to consider that question separately. Subsequently to both these, the cases of *Rex v. Wells* and *Allnutt*, and *Rex v. Sloper* and *Allen*, arose, in which the present question was decided, after reviewing all the authorities, in the affirmative. Upon the whole I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the Crown comes after seizure and before sale, it ought to be preferred, unless by the statute 33 Hen. VIII., c. 39, s. 74, there has been an alteration made in the ancient prerogative, by which the priority has been taken away.

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I therefore come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative: but authorities \*are not wanting. In *Cecil's* case (1) the Court so expressly resolve; and other passages might be as easily cited, if necessary, to the

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(1) 7 Co. Rep. 92.

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same effect. The real question, however is, not, whether the prerogative is abridged, but, to what extent it is abridged by the clause. If taken literally, the clause would, as has been well observed, place the Crown in a worse situation than a subject: this could hardly be the real intention of the Legislature, in a reign not remarkable for such concessions. There are, however, two grounds, either of which, as it seems to me, is sufficient to show that this clause of the statute is not applicable to the present question. First, the words are confined to suits commenced or taken, or process awarded, for the recovery of the King's debts. Now, I apprehend that an immediate extent does not fall within either of these descriptions; they are confined to suits and process for the recovery of the King's debts in the ordinary course, from his solvent debtors. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues not for the purpose of seizing his property for the amount of the debt, but all his lands and goods into the hands of the Crown, there to remain till the Crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings in an ordinary suit, and even where the debt is disputed: *Rex v. Pearson* (1). In an ordinary extent, which is a prerogative execution, the debt of course is conclusively settled by the judgment; but in an immediate extent the debt is not settled, but may be disputed by the debtor on the return of the writ: in fact, it is then that the suit or process \*respecting the King's debt, properly speaking, begins. These various differences seem to me to show that this proceeding could not have been contemplated by the Legislature, when they speak in this clause of suits and process for the recovery of the King's debts. But, secondly, I think, and this will appear from a reference to the state of the law as it existed at the time the statute was passed, that even if an immediate extent were a suit or process for the recovery of the King's debt, still the clause would not be applicable to this case.

[ \*109 ]

This is very clearly stated by Lord Coke (2): "As to the third

(1) 3 Price, 288.

(2) 1 Inst. 131 b.

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protection *cum clausula volumus*, the King, by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor, before any subject, although the King's debt or duty be the later; and the reason hereof is, for that *thesaurus regis est firmamentum belli et fundamentum pacis*; and therefore the law gave the King remedy, by writ of protection, to protect his debtor, that he should not be sued or attached until he paid the King's debt. But hereof grew some inconvenience; for to delay other men of their suits, the King's debts were more slowly paid; and for remedy thereof it is enacted by the statute 25 Edw. III. c. 19, that the other creditors may have their actions against the King's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the King's debt, and then he shall have execution against the King's debtor for both the two debts."

It appears, therefore, that when the statute 33 Hen. VIII. was passed, the creditors of a Crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the Crown, and new restraints, on the other \*hand, imposed on the prerogative: certain debts to the King, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting them. It is so laid down by Lord Chief Baron GILBERT, page 88, and is in conformity with the general law, which I have before stated from Lord HOBART's reports; for, in order to make the King's debts, not of record, bind from the time of their contracting, a statute would clearly be required. Lord Chief Baron GILBERT, in another part of his treatise, says, "this branch of the statute had its origin in the practice introduced by the 3 Hen. VII. c. 3, of taking recognizances to the King before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs and constables; the two latter of whom, when they bailed, took the obligation in their own names, and not to the King. Now these recognizances to the King being only personal securities, it became a doubt when they began to bind the lands of the subject, and formerly they held that such recognizances did not bind the land till they were returned of record." And the 56th section, which, if construed

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literally, would appear wholly useless, as far as related to the Court of Exchequer, may, I apprehend, have a sensible construction given to it by referring to the second part of the 54th section, by which the King was authorized to proceed with suits depending in the name of a common person, to his Grace's use, and which therefore required to be placed on the same footing as to execution with suits originally brought by the Crown. I think, therefore, that so far as relates to the King's debts, all that was in effect done by the various sections of the 38 Hen. VIII. c. 39, was to give a priority to the particular debts not being of record, as if they had been contracted \*originally by a recognizance in the nature of a statute staple, which binds from the time of the contracting. Now reasoning *à priori*, it would be probable that such a new power would have some counterbalance, in order to place the subject as nearly as possible in the same situation as he was by the 25 Edw. III. By that Act the subject's writ of execution might be stayed from the time the King's debt on record was contracted ; a date easily to be ascertained ; but when the King's debt, not of record, was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period ; and it might well be considered unjust to superadd such a hardship in the case of a person who levied under an execution, sued out, indeed, after the King's debt was contracted, but after a contract, of which, not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed, rendering it necessary for the Crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now, I apprehend that this was in fact done by the 74th section, which I construe as providing, that if before the King's debt is put in suit, the subject has obtained a judgment, on which, but for the new law, he might have sued out a writ of execution in due course, he shall still have the writ of execution, and proceed on it, notwithstanding the King's debt was in existence, and in defiance of any writ of protection from the Crown. In this case, therefore, the Crown is prevented from staying the proceedings by any writ of protection, and the

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creditor, if, by using due diligence, he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the Crown, shall be entitled to reap the \*fruits of his diligence. The words are, "the King shall have first execution," which I think means, "shall first have a writ of execution from the Court." In like manner, in the statute, 25 Edw. III. c. 19, the words are, that the creditor, having settled for the King's debt, "shall have execution" against the defendant, which clearly there means, shall have a writ of execution. Upon the words, therefore, as well as upon the intention of the 38 Hen. VIII. c. 39, s. 74, as collected from the Act itself, compared with the statutes which preceded it, I have come to the conclusion, that according to the true construction of the 74th section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *Rorke v. Dayrell*, and *Uppom v. Sunner*; but after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment, and finding them in opposition, as it seems to me, to the cases of *Rex v. Cotton*, *Attorney-General v. Capell*, *Rex v. Peck*, *Rex v. Wells* and *Allnutt*, *Rex v. Sloper* and *Allen*, and, I should also say, to *The Attorney-General v. Andrew*, and the uniform course of the Court of Exchequer, I think that those cases are not well decided, and that, both on the ground that they are contrary to the true construction of the Act, as deduced from a proper reading of it, if the question were *res integra*, and also on the ground that they are opposed to cases of greater weight and authority, to which I have also referred. I have to apologise to your Lordships for the length at which I have considered this question; but I trust that the importance of it, and the great weight due to the authorities, on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your \*Lordships, as I believe there is no difference of opinion upon it. I think that it should be answered in the negative.

[ \*113 ]

TAUNTON, J.:

The first question propounded by your Lordships to the Judges is one of very considerable difficulty, arising, in my humble

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judgment, not so much from the nature of the subject when properly understood, as from the conflicting decisions of the Courts in Westminster Hall. This question may be considered in two points of view, first, whether by the seizure, on the part of the sheriff, of the goods under the writ of *fiery facias*, the property is so altered as to leave nothing in the debtor upon which the writ of extent can attach ; and, secondly, whether the statute 33 Hen. VIII. c. 39, s. 74, applies to the present case ; which latter inquiry involves a consideration of the law as to the prerogative with respect to the King's debts before, and at the time of passing that statute.

With respect to the first point, it is so clearly laid down in all the text books, as a general proposition, that the property of goods is not altered, but continues in the defendant until execution executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed ? It would seem from the language of the writ of *fiery facias*, that the sheriff has not completed the whole of his duty under the writ until he has converted the goods and chattels seized into money, for the writ enjoins him, that of the goods and chattels of the defendant he cause to be made so much money ; and he is further enjoined that he have that money before the King at Westminster, on the return-day, to be rendered to the plaintiff ; so that the selling or making of the goods into money appears to be the most \*essential part of the sheriff's duty. But it has been contended in many of the cases upon this subject, and more particularly by the late Mr. Baron Wood, in his elaborate judgment in the case of *Rex v. Giles* (1), that the execution is executed by the seizure, and certainly, if that were the case, there would be an end of the question, because it is abundantly clear that after execution executed an extent from the Crown comes too late : *The Attorney-General v. Fort* (2). In such case the property is altered, and the Crown cannot, in process against A., seize the goods of B. Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the

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(1) 8 Price, 293, 314.

(2) 8 Price, 364, n.

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grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry or conviction of felony, nor would they pass under a grant of all his goods; and if, after seizure, the defendant pays the debt to the sheriff, he is entitled to have his goods again without any grant from the sheriff, or, if a leasehold, without a reassignment. So also, I apprehend, if goods in execution are burnt, or otherwise injured, without fault of the sheriff, it is the loss of the defendant. The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which every bailee, such as a carrier, wharfinger, &c. who is answerable over, has for his own protection. This interest, if so it may be called, is denominated a special property, as contradistinguished from a general property, and in respect of this we know that he may bring trover for the goods seized against a stranger, but it is not a beneficial interest. In addition to these \*illustrations, there is the authority of Lord HARDWICKE, who lays it down, in 2 Eq. Cases Abridged, 381, that neither before the Statute of Frauds, nor since, is the property in the goods altered, but continues in the defendant until the execution executed. The cases cited by Mr. Baron Wood, in support of his opinion that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites, with respect to goods and chattels, is *Lechmere* and others v. *Thoroughood* and another (1). That was an action of trespass, not trover, brought against the sheriff. The extent there was after the seizure, and before any sale or *venditioni exponas*; and it appears, certainly, that a question was made, whether the extent did not come too late, and the Judges are reported to have intimated an opinion that it did; but the case was not decided upon that ground; judgment was ultimately given for the defendant, (and not for the plaintiffs, who impeached the validity of the extent), upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out, were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of

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(1) Comberb. 123; 3 Mod. 236.

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them, Comberbach's, Lord HOLT is, indeed, reported to have said, "the property of the goods is 'vested by the delivery of the *feri facias*;' " but this is directly contrary to the opinion of Lord HARDWICKE, in 2 Eq. Ca. Abr., and to the cases of *Bardon v. Kennedy* (1), and *Phillips v. Thompson* (2); in the latter of which it was decided, that by the delivery of the writ, the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is no execution thereof; and this *dictum* of Lord HOLT, Lord MANSFIELD, in *Cooper v. Chitty* (3), \*suspected was a mistake of the reporter. The next case relied on by Mr. Baron WOOD, is *Clerk v. Withers* (4); in that case the principal question was, respecting the operation of the stat. 17 Car. II. c. 8, upon a judgment by default, obtained by an administrator, whether, as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate who could by process compel the sheriff to sell. It was incidentally contended there by counsel, that a seizure by the sheriff was a satisfaction of the debt, and therefore that the plaintiff, who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord HOLT carried this, was, that the seizure to the value of the debt discharges the defendant, unless the execution be afterwards avoided, and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution, being an entire thing, when once begun shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before sale: the sale under such circumstances being considered but a formal part of the execution. There was no decision that, as against one having a paramount claim, the property by the seizure was irrevocably changed, but the whole is consistent with the hypothesis, that the goods in such a case are in the custody of the law. With respect to the argument drawn from the statute 21 Jac. I. c. 19, which provides, that where no execution or extent has been served and executed,

(1) 3 Atk. 739.

(2) 3 Lev. 191.

(3) 1 Burr. 20.

(4) 6 Mod. 290.

creditors by judgment statute, &c. or other security, shall not be relieved thereupon for more than a rateable part of their just and true debts with the bankrupt's other creditors, \*without respect to any greater sum in such judgment, &c., or other security; upon which it has been determined, that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; and from which determinations Mr. Baron Wood draws the conclusion, that they must have proceeded on the ground, that as soon as goods have been seized under a *feri facias*, that seizure is considered in law as being an execution executed: the answer is, that these determinations only prove that, as between subjects, an execution once begun by seizure, shall proceed notwithstanding a subsequent act of bankruptcy and commission issued; and in the case of *Audley v. Halsey* (1), which I believe was the first decision to this effect, wherein the circumstances were nearly the same with those in *Stringefellow's* case (2), the main difference being, that in the one the bankrupt commissioners claimed against the extent upon the Statute Staple, and in the other the Crown, the Court expressly distinguished it from the case in *Dyer*, by saying, "for there, although the goods were extended, yet they were not delivered to the cognusee, and the writ was not returned, and the writ of privilege was for debt due to the King, wherein the King has his prerogative by the Common Law." In addition, I may observe, that the distinction taken in the recent cases of *Wymer v. Kemble* (3); *Notley v. Buck* (4); and *Morland v. Pellatt* (5), which were in exposition of the statute 6 Geo. IV. c. 16, s. 108 (6), proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the payment \*of the money directed to be levied. In *Wymer v. Kemble*, the goods of the debtor had been seized under a *feri facias*, and delivered to the creditor under a bill of sale by the

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(1) Cro. Car. 148.

(2) *Dyer*, 67 b.

(3) 6 B. & C. 479.

(4) 8 B. & C. 160.

(5) 32 R. R. 516 (8 B. & C. 722).

(6) Repealed, 12 & 13 Vict. c. 106  
(that statute is also repealed).

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sheriff, then a bankruptcy followed, and it was held that the plaintiff had ceased to be a creditor, the original debt having been extinguished by the sale. The like decision was come to in *Morland v. Pellatt*, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy; but in *Notley v. Buck*, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of it, it was held that the sheriff could not pay over to the creditors the proceeds of the execution received upon a sale after the bankruptcy.

But although the position that the property is not divested out of the debtor by mere seizure under *fieri facias* was partly admitted by the counsel for the plaintiff in error in this case, yet it was most strongly pressed by him in his argument, that by the seizure the judgment creditor here had a claim on the goods, or a special property therein, and that the Crown under an extent can only take, subject to that lien, a special property; and this right of the judgment creditor, he observed, had not been adverted to in any of the cases, with respect to the property. Many other cases might be added, but enough probably has been said; and I will only add the authority of Mr. Justice BAYLEY. In *Morland v. Pellatt*, that learned Judge says, "after seizure and before sale, the sheriff has a special property in the goods, but the debtor has the general property up to that time, therefore the debt is not extinguished, and the judgment creditor has a security for his debt; this special property is \*in him, not as trustee for the judgment creditor, but for the purpose of his own protection." Neither had the judgment creditor in this instance any lien on the goods. Let us see what a lien is? In *Hammonds v. Barclay* (1), Mr. Justice GROSE says, "A lien is a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." The MASTER OF THE ROLLS, in *Gladstone v. Birley* (2), lays it down, "the question always is, whether there be a right to detain the goods till a given demand shall be satisfied." In *Lickbarrow v. Mason* (3), Mr. Justice BULLER observes, "liens

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(1) 2 East, 227.

(2) 2 Mer. 401, 404.

(3) 6 East, at p. 25, n.

at law exist only in cases where the party entitled to them has the possession of the goods, and if he once parts with the possession after the lien attaches the lien is gone." In *Heywood v. Waring* (1), Lord ELLENBOROUGH says, without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed. In *Hallett v. Bousfield* (2), Lord ELDON (3) asks, "how can the doctrine of lien, that is the right of a party having property in his possession to retain it until his demand is satisfied, be applied to the interest of a freighter, who has no possession, the whole being in the possession of the owner?" (And many other *dicta* to the same effect are collected by Mr. Montague in his Summary of the Law of Lien, Introd. Ch. p. 1, &c.) So here I ask, how can the doctrine of lien, to retain these goods, be applied to this judgment creditor, who had no possession, the goods being in the possession of the sheriff? The sheriff seizes, not as the agent or servant of the party, but as a minister of justice, and an officer of \*the Court, therefore his possession is not the possession of the creditor, but the custody of the law; but if there was no lien, the cases of *Rex v. Humphery* (4), *Rex v. Lee* (5), and *Casperd v. The Attorney-General* (6), which were cases of a wharfinger's and a factor's lien, and an equitable mortgage by deposit of the title-deeds, are inapplicable, the creditor there having actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the property is as it were in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

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But it was said, that the judgment creditor, by force of the seizure, had at least a security. This has certainly been so decided with reference to the 6 Geo. IV. c. 16, s. 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell

(1) 4 Camp. 291.

(2) 11 R. R. 184 (18 Ves. 187).

(3) The question here ascribed to Lord ELDON is given in the report among the arguments of counsel.

(4) 29 R. R. 783 (1 M'Clelland & Younge, 173).

(5) 20 R. R. 664 (6 Price, 369).

(6) 20 R. R. 671 (6 Price, 411).

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trees standing and growing on the land, which he may lawfully do, the vendee, in common language, might be said to have a security for the money which he has advanced, but if the vendor should die before the trees are severed from the soil, the right of the remainder-man or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case—I say no more at present—that a *jus tertii* might interpose and destroy it.

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This brings me to the consideration of the second branch of the question, namely, whether the extent in this case at the suit of the Crown constituted such a *jus tertii*. It is perfectly clear, that at common law the King had very peculiar prerogatives, much beyond \*the common right of a subject, for the recovery of his debts. Of these (not to mention others which are not to the present purpose) one was, that “where one was indebted to the King and likewise to other persons, the King’s debt was to be preferred in payment, that is, the King was to be paid before any other creditor of the party,” and, consequently, to be preferred in an execution (1). The general rule is, and this has been acknowledged in all the cases, that when the right of the King and that of a subject concur, that of the King shall prevail; see the instances put in, *The Attorney-General v. Andrew* (2). But in ancient times the law of prerogative went further than this, and provided the most effectual means of security that the King’s title should always be the first. It prohibited the creditors of a King’s debtor even from taking out execution until all the King’s debts were satisfied, although the King’s debts were the later in point of time; and if the King’s debtor, notwithstanding, was sued or attached, the King had a remedy by a writ of protection to protect his debtor (3): *Rex v. Cotton* (4). A King’s debtor could not make a will to dispose of his chattels to the King’s prejudice, nor could his executor have administration without permission from the King or justices or Barons of the Exchequer, upon giving security to answer the King’s debts; see numerous precedents in Maddox’s Exch. c. 23. These prerogatives have

(1) 2 Madd. Exch. 183, c. 23, s. 7.

(3) Co. Litt. 131 b; Fitz. N. B. 65,

(2) Hardres, 23; Plowden, 258,  
259, 264.

66, tit. Protection.

(4) Parker, 125.

at different times been controverted and regulated by statutes, but these very statutes testify their existence. Thus in the stat. of Magna Charta, 9 Hen. III. c. 18, it is enacted, that if any holding of the King a lay-fee do die, and the sheriff shew the King's letters patent of his summons \*for debt, which the dead man did owe to the King, it shall be lawful to the sheriff to attach and enrol all the goods and chattels of the deceased being found in the lay-fee to the value of the debt, so that nothing thereof should be amoved until the debt be paid off, and the residue should remain to the executors to perform the testament of the deceased. Again, the stat. 25 Edw. III. c. 19, after reciting, that forasmuch as the King had before that time made protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made *gree* to our Lord the King of that which to him was due by them by reason of his prerogative, and so during such protections no man hath sued nor durst implead such debtors, enacts, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors, and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King of his debt, and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them. After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the King's debts were paid or secured. The King being entitled to the first execution, this execution, it is material to recollect, at the common law, was against the body, the lands and the goods of the accountant or the King's debtor: *Sir William Harbert's case* (1). \*The words of Lord Coke on this point are, "it was resolved, that at the common law the body, the land and the goods of the accountant or the King's debtor were liable to the King's

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[ \*123 ]

(1) 3 Co. Rep. 12 b.

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execution, for *Thesaurus regis est pacis vinculum et bellorum nervi*; and therefore the law gave the King full remedy for it; and therewith agrees 5 Eliz., Dyer, 224, and Plow. Com. 321. Sir William Cavendish's case, who was treasurer of the chamber, 24 Edw. III.; Walter de Chirton's case, and infinite precedents in the Exch., go to prove, that for the King's debt, the body and the land of the debtor should be liable by the common law before the statute of 33 Hen. VIII. c. 39." The statute did not give to the Crown this triple remedy, and whether it could be pursued, as now, by one single process, or must have been separately worked out by different writs, is a matter of no moment. Thus stood the law until the statute 33 Hen. VIII. c. 39, passed; and upon this short statement there seems to be no doubt, that if no alteration of the law in this respect was made by that statute, the King in the present instance is entitled to preference under the extent, although it did not reach the sheriff until the *feri facias* was partly executed by seizure: for it would be absurd to hold, that when it was unlawful to issue any execution before the King's debt was paid, the creditor, by his disobedience to the law in suing out an execution, should gain an advantage over the King. Then has the statute 33 Hen. VIII. c. 39, altered the law in this matter? That statute, sec. 74, enacts, that if any suit be commenced or taken, or any process hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said sovereign Lord, his heirs and successors, shall have the first execution \*against any defendant or defendants of and for his said debts before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons. It has been very properly observed by Lord Chief Baron MACDONALD, in his judgment in the case of *Rex v. Allnutt* (1), that, according to the construction put upon this clause in the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, it must have the effect of postponing the King's execution, though it

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(1) 14 R. B. 347 (16 East, 280, 281, n.).

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should happen to be prior both in *teste* and delivery to the subject's execution on his prior judgment, which would be putting the Crown, as to its execution, upon a worse footing than a subject, inasmuch as between subject and subject the priority of the delivery of the writ of execution always determines the question of preference, without regard to the priority of the judgment. Such a result surely could never have been intended, and this goes some way to shew that the construction animadverted upon is not the right one. But I am of opinion, upon other grounds, that this section of the statute has been misunderstood. The first branch declares generally, that the King's suit and process shall be preferred before the suit of any person or persons. This seems to be distinct from the latter branch, which confirms the right that the King had before this statute, of having the first execution, not a preference where there are two concurring executions, one at the suit of the King, but the first execution, that is, the sole and exclusive execution, against any defendant for his debts before any other person. Then comes the condition or proviso, "so always that the King's said suit be taken and commenced or process awarded before \*judgment given for the said other person." Now I take this

sec. 74 to be a supplement to chap. 19 of the 25th Edw. III., and the judgment mentioned therein to mean judgment obtained by favour of the latter statute. Then the meaning will be this, where the subject has obtained no judgment, the King is entitled, as of course he must be if he sued out process, to the first execution. But if the subject has obtained a judgment before any process sued out by the Crown, the execution thereof shall not be divested by stat. 25 Edw. IV. c. 19, but be put in suspense till *gree* be made to the King of his debts; but in such case he is at liberty to follow it up by execution, although the King's debt be not paid, and if he can get his execution completely executed before the King's process be sued out, he will be safe, for the King is only to have absolutely the first execution where the King's suit is taken and commenced, or process awarded, before judgment given for the other person. By this construction the greater difficulties, in my humble judgment, will be overcome, though perhaps some may remain; and this will account for the disuse of protections afterwards,

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which would be unavailing when the King had no longer a right in all cases to the first execution.

[ \*126 ]

So much by way of argument from the account we have in our books of the ancient prerogative, and from the statutes. The cases that have been decided upon this question have been so often cited, that it is unnecessary to go through them all ; I will only observe, that the weight of authority appears to me to preponderate very considerably in favour of the right of the Crown. The course of decision in the Court of Exchequer has been uniformly, with the exception of *The Attorney-General v. Andrew* (1), and Mr. Baron Wood's opinion in *Rex v. Giles*, on that side ; and \*considering that this is the King's great court of revenue, in which the Judges are more particularly conversant with these matters, this consistency of judgment ought to carry great weight with it. In *The Attorney-General v. Andrew*, the reasons assigned by the Judges are extremely short, and in truth consist only of two : the one, that the statute 33 Hen. VIII. abridges the prerogative and controls the common law, and that the words in the 74th section make a condition precedent, and imply a negative ; the second, that there the subject's title was prior to the King's, and was executed. I have already explained why, in my opinion, the interpretation that has been made of this statute is an erroneous one, and why this statute does not affect the present case. With respect to the holding that the subject's title was executed if *liberates* had issued upon the elegits, which does not appear to have been the case, there is no doubt but that this was so ; but if nothing more had been done than extending the lands upon the elegits, I take the liberty of saying, that the subject's title was not executed, and for this *Stringefellow's* case (2), 3 Edw. VI., is my authority. In that case, *Stringefellow* had issued out a writ of *extendi fucias*, to have execution of a statute staple ; the sheriff made extent of the defendant's lands, and seized them into the King's hands, but did not make livery ; and afterwards a writ of the King's prerogative, issued out of the Exchequer, reciting the prerogative which the King ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt of the goods of the debtor, and if he

(1) Hardr. 23.

(2) Dyer, 67 b.

had not sufficient, then to extend his land. This writ was delivered to the sheriff after the day of the return of the first writ, but before the first writ was returned. On the sheriff returning to the King's writ that the \*debtor had no goods or lands to be extended besides the goods and chattels, lands and tenements above extended, and therefore, as to the further execution of that writ, he had done nothing, it was holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, return the extent into the Exchequer for the service of the King's debt; and Justices HALE and BROMLEY were of the same opinion, because the property of the goods and land was not in Stringefellow before they were delivered to him by the writ of *liberate*. This case has always been acknowledged for good law; and although a query is subjoined by the reporter, because the goods, on being seized into the King's hands to be delivered to the party, were in the custody and consideration of the law, and privileged from all other executions, yet this doubt proceeds from not attending to the distinction between the King's case and that of a common person. In the case of a subject, goods distrained or seized in execution cannot be again taken for that reason, but it is otherwise in the case of the King: *The Attorney-General v. Capell* (1); see also the note by MANWOOD, C. B., in margin (2).

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The cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, appear to me to have been determined on wrong principles. Little research seems to have been made, in either, into the nature and extent of the royal prerogative at common law; in the first, the judgment proceeded principally on the statute 38 Hen. VIII.; and in the latter, on the mistaken assumption that the property was changed by the delivery of the writ to the sheriff. With all my respect for the learned Judges by whom these cases were decided, and no one can have greater, I cannot assent to them, and I say this with the more freedom, because on no less than three \*solemn occasions the Court of Exchequer has subsequently testified a similar dissent. The case of *Thurston v. Mills* (3) is no authority either way, because, although the Court intimated they

[ \*128 ]

(1) 2 Show. 481.

(2) Dyer, 67 b.

(3) 16 East, 254.

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had formed an opinion on the point, it was not divulged. With these exceptions, the determinations of the Courts will be found from the earliest times to have been in favour of this prerogative; I therefore humbly give it as my opinion that the first question propounded by your Lordships should be answered in the affirmative.

With respect to the second question submitted to the Judges, as to any difference whether the writ of extent be in chief or in aid, I am of opinion that in this respect there is no difference between an immediate extent and an extent in aid. It appears to have been the practice in very ancient times, that if the King's debtor was unable to satisfy the King's debts out of his own chattels, the King would betake himself to any third person who was indebted to the King's debtor, and would recover of such third person what he owed to the King's debtor, in order to get payment of the debt he owed to the Crown (1). In like emergencies, the King's debtors or accountants were wont to have writs of aid whereby to recover their debts of such persons as were indebted to them, in order to enable them to answer the debts they owed the King. Many precedents of both modes of proceeding are cited by Maddox in the notes, c. 23, ss. 8 and 12. One of them is in the fifth year of Rich. I. in the great roll whereof it is stated, that Henry de Cornhill owed the King 100*l.* for the arerage of the cambium of all England except Winchester, and 6*l.* for the fenne of the land of Engelran de Musterel. And William Earl of Albermarle acknowledged before the Barons of the Exchequer that he owed so much \*to Henry de Cornhill, and thereupon William Earl of Albermarle was charged, as debtor to the King, with the said respective sums. Others are of the reign of Hen. III. and Edw. I.; in some of them the mandate is to the sheriff to distrain a former sheriff, or to aid collectors and assessors in distraining persons indebted to the King for aids or the like, and therefore are not properly extents in aid, the process being against persons originally indebted to the Crown; but in some instances, as in those of the executors of Hubert de Burgh, Walter de Walford, and the executors of the late Bishop of Hereford, the mandate to the Barons is, that they distrain the

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(1) 2 Madd. Exch., p. 189, c. 23, s. 8.

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debtors of those particular persons, in order that the King may be satisfied the debts which they owe to him respectively, according to the law and custom of the Exchequer. This process, though now called an extent in the second degree, is in principle the same as that called peculiarly an extent in aid, the only difference being, that in the one case the Crown is the real as well as the nominal plaintiff; in the other, the process is sued out for the recovery of the debt due to the King's debtor and for his benefit. It is clear, therefore, from these authentic records, that the practice of charging the debtors of a person indebted to the King for the King's debt goes back as far as the period of legal memory, and the process has been gradually moulded into its present shape, and limited to its present extent, by statutes and by the rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no difference whether the writ of extent was in chief or in aid.

VAUGHAN, B.:

After much consideration devoted to the question which your Lordships have been pleased to propound to the Judges, I am of opinion \*that the writ of extent issued by the Crown, under the circumstances stated, ought of right to supersede the subject's execution.

[ \*130 ]

During the progress of this inquiry my mind has been agitated by doubts suggested by a review of the conflicting judgments which have been pronounced in the superior courts of Westminster Hall upon this long controverted question, involving a claim to exercise an important prerogative of the Crown on the one part, and a valuable civil right of the subject on the other.

The arguments in favour of the plaintiff in error may be resolved into the following propositions:

First, that no prerogative right existed in the Crown by the common law to issue an extent whereby the goods and chattels and lands of the King's debtor might be extended, and his body seized, to enforce the payment of his debt.

Secondly, that, admitting the existence of such prerogative right under the common law, it was restricted and controlled

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by the statute 33 Hen. VIII. c. 39, so as to prevent its operation in the case *sub judice*.

Thirdly, that, independent of all prerogative right, after an actual seizure of the sheriff under a *feri facias*, at the suit of a judgment creditor, the property in the goods taken became thereby altered, no longer continuing the property of the debtor, and consequently no longer amenable to the process of the Crown.

Fourthly, that the sheriff acquired by the seizure such a special property in the goods as to deprive the Crown of any benefit to be derived from this process of extent.

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The main question depends upon the true construction of the 33 Hen. VIII. c. 39, s. 74; but, in the interpretation of this statute, the important preliminary inquiry presents itself; viz. whether before, and independent of, any legislative enactments, the Crown was \*not entitled by the common law to extend the lands and to take the body, as well as the goods and chattels, of the King's debtor in satisfaction of the debt. Sir Edward West, in his Treatise upon the Law and Practice of Extents, states, (but, as I conceive, erroneously,) that the Crown derived its power of issuing an extent from the provisions of this statute. In page 108, he observes, that "this statute gave to the Crown a new kind of execution for all its debts; a species too of execution, which before that statute was the subject's execution, and the subject's only;" and in page 110 he repeats "that the subject's process by extent being imparted to the Crown, the Crown will of course have the same rights in the use of that process as the subject."

The author of that treatise seems to have been betrayed into this error by what I would rather call an equivocal, than an inaccurate, expression of Lord Coke in his Comment upon the 8th cap. Magna Charta, 2 Inst. 19, which contains the following passage: "after the statute 33 Hen. VIII. c. 39, was made for levying the King's debts, the usual process to the sheriff at this day is, *Quod diligenter per sacramentum*," &c. From the words, "after the statute," Mr. West infers that the King was not empowered, by virtue of his prerogative at the common law, to issue any writ of extent to enforce the payment of his debts before that statute, such authority being created and conferred,

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for the first time, by the provisions of that Act. Lord Chief Baron GILBERT understands this expression of Sir Edward Coke's, "after the statute," &c., in the same sense, although he suggests a doubt respecting its accuracy; for in page 127 of his Treatise on the Court of Exchequer, after transcribing a process known by the name of the Long Writ, he observes, "My Lord Coke says this writ was made *since* \**the statute*, but of this I have great doubt, because it seems so contrived that an inquisition should be found whether the debtor had any goods or chattels, and if upon inquisition there were none found, then to extend the lands and to take the body of the debtor. So that it seems this writ might have been used before the stat. of Hen. VIII. without any violation of Magna Charta, for if it were found that the debtor had no goods, they might seize the lands and take the body; and, therefore, it seems to be a writ that was used upon motion to the Court, and in cases of necessity, *before* the stat. of Hen. VIII.; but since that statute they may have a *capias levare*, or extent, without any such inquisition touching the goods." The opinion of Sir E. Coke appears to me to have been misapprehended. I do not understand him to affirm that the King had no power of issuing an extent for the levying of his debts before the statute, but that the particular writ of which he gives only a partial extract, had been the usual process to the sheriff since that statute, and was so at that day. Indeed, the very first passage in the 8th chap. of Magna Charta, upon which he is commenting, "*Nos vero vel ballivi nostri non seziemus terram aliquam vel redditum pro debito aliquo quamdiu catalla debitoris præsentia sufficiant ad debitum reddend et ipse debitor paratus sit inde satisfacere,*" was introduced in ease of the subject, for the purpose of restraining the power of the Crown, and correcting an abuse of the prerogative, by preventing the seizure of the lands and rents of the Crown debtor, where goods and chattels could be found sufficient to satisfy the debt. Lord Coke observes upon this passage, that "by order of the common law, the King for his debt had execution of the body, lands, and goods of the debtor," and adds, "this is an act of grace, and restraineth the power the King had before." Both the text and the comment, therefore, conspire to prove that \*Lord Coke could never

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intend to ascribe the origin of the process of extent to the stat. of Hen. VIII.: indeed, the reports of that eminent lawyer are replete with resolutions confirming the prerogative right of the Crown to issue process of this description from the earliest times. I will cite one case only from his reports in proof of this position, *Sir William Harbert's case* (1). It was there resolved, that at the common law, the body, the lands, and the goods of the King's debtor, or accomptant, were liable to the King's execution, for that *thesaurus regis est pacis vinculum et bellorum nervi*, and, therefore, the law gave the King the full remedy for it; and therewith agrees the 5th Eliz. Dyer, 224, and Plow. Com. 321 a; *Sir William Cavendish's case*, 24 Edw. III.; *Walter de Chirton's case*; and infinite precedents in the Exchequer, to prove that for the King's debt the body and land of the debtor shall be liable by the common law before the statute 33 Hen. VIII. c. 39. I have before observed, that Lord Coke gives only a partial extract of the usual process which he states to have issued since the statute 33 Hen. VIII. If the whole of it had been inserted, it would have appeared from the concluding part whether it issued from the office of the King, or of the Lord Treasurer's Remembrancer.

The long writ introduced and commented upon by Lord Chief Baron GILBERT, in the chapter in which he expresses his doubts respecting the accuracy of Lord Coke as to the period of time when that species of process was first issued for the purpose of securing the King's debts, was undoubtedly a writ from the office of the King's Remembrancer, as appears from the concluding part of it, containing an injunction not to sell until the further order of the Court; from the bonds remaining in the custody of the King's Remembrancer; and from \*its referring in distinct terms to the stat. 33 Hen. VIII. as the authority from which it emanated, and being also signed by Masham, who was at that time an officer, not in the Lord Treasurer's, but in the King's Remembrancer's Office. Without professing to have examined the infinity of precedents to which Sir Edward Coke alludes, the searches I have made have satisfied my mind, that from that department of the revenue office in the Court of

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(1) 3 Co. Rep. 12 b.

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Exchequer under the control and management of the Lord Treasurer's Remembrancer, a strong prerogative process or writ, combining in effect the *feri facias*, the *levari facias*, and *capias corpus*, has, from the earliest times, been issued upon special application, founded upon the necessity of the case, without any previous summons or notice, and directed at once against the goods and chattels, lands and tenements, and body, of the Crown debtor, to levy all such debts as, by being charged upon the revenue rolls in that office, were become in the nature of recorded debts or duties. The more ordinary and usual course of proceeding was to transmit them to the Pipe Office, and enter them upon the roll annexed to the summons of the pipe, to be levied by that process; and if returned *nihil* by the sheriff, to introduce them into a schedule, as described by Lord Chief Baron GILBERT, and send them into the office of the Lord Treasurer's Remembrancer, to be levied by the general prerogative process, or long writ, which issued periodically, at two stated seasons of the year, for the recovery of all such debts. I will not abuse your Lordships' patient attention by stating the reasons which have led me to conclude that Lord Chief Baron GILBERT may have confounded the long writ issued from the office of the King's Remembrancer, under the authority of the statute 33 Hen. VIII., with the long writ which it has been \*immemorially the course of the Court of Exchequer to issue from the office of the Lord Treasurer's Remembrancer. It may be sufficient for the purpose of the present inquiry to take it, upon the authority of so eminent a Judge, who presided at the head of the Court of Exchequer, that long anterior to the statute of Hen. VIII. such debts of the Crown as were entered on the great roll in the Treasurer's Remembrancer's Office might be levied by a process having the force and virtue of an immediate extent. I would, therefore, conclude my observations upon this first branch of the inquiry with a passage from Lord Chief Baron GILBERT's Treatise on the Court of Exchequer, p. 90, "An extent of a later *teste* supersedes an execution of the goods by a former writ; because by the King's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded until the extent was

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executed, because the public ought to be preferred to private property."

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I proceed to the second branch of the inquiry, how far the statute 33 Hen. VIII. c. 39, restricts or controls this prerogative. In considering the legal operation and effect of such of its clauses as have relation to this question, we should remember, that it was passed at a period of time when that monarch was in the plenitude of his power, when the revenues of the Crown had been recently greatly augmented by the surrender and dissolution of the abbeys and monasteries, and by the daily increasing commerce and prosperity of the kingdom; nor can we forget, that the history of that reign records more frequent examples of sacrifices extorted from his subjects than of any voluntary surrenders of his acknowledged prerogatives to them. Upon the first forty-nine sections of this statute, relating \*to the erection of the court of surveyors of the King's lands, its officers, and their authority, (all which have long since ceased to exist,) it becomes unnecessary to make any observations. The object of the Legislature in the six consecutive enactments, from section 50 to 56 inclusive, was the more speedy recovery of debts due to the Crown upon obligations and specialties, which not being (before that Act) enrolled of record, were not amenable to the strong prerogative process of extent. The statute, therefore, gave them the force and effect of obligations acknowledged, according to the statute staple at Westminster. It gave also to the King his costs, as to a common person. It gave to each of the several Courts, as well to those recently erected as to those already existing, and mentioned in the 55th section, the same co-extensive power and authority to commence and prosecute suits for debts and duties grown due to the Crown in respect of obligations remaining in each of those several Courts and offices, and to hear and determine them, and to award execution upon the body, lands and goods of the parties condemned therein. But it appears to me a fallacy to suppose that, because it directed in what offices and Courts (some of those Courts being then recently erected) the suits should be commenced, and what process might in their discretion be used, (mentioning, *inter alia*, the *capias*, *extendi facias*, &c.,) therefore the power of issuing such process was

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given, for the first time, to the Court of Exchequer. As applied to obligations and specialties, which before that statute were matters *in pais*, not yet ripened into matters of record, I admit they were not liable to the immediate extent until rendered mature for that process by becoming enrolled of record. The sections to which I have referred, from 50 to 56, appear to me exclusively applicable \*to the debts and duties accruing in respect of the obligations and specialties mentioned in those sections. Section 57 enlarges the jurisdiction of the several Courts therein enumerated; extends their authority to a variety of other subjects having no relation to the present inquiry; and after introducing various regulations respecting the offices of receiver, auditor, accomptant, &c. (imposing penalties upon them for the breaches of their respective duties) the statute proceeds to enact the 73rd and 74th sections, the last of which gives occasion to the present question. The 73rd section directs, that in all actions and suits for the recovery of any debts which shall accrue to the King by reason of any attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means, it shall be sufficient to declare generally, without shewing the circumstances at large, according to the due order of the common law. Then follows immediately the much controverted 74th section. The first branch of this clause, introducing the proviso, contains a plain declaration of the King's prerogative right, under the common law, by which he was at all times entitled to have his suit preferred, and to have first execution. The proviso was undoubtedly intended to ingraft some qualification or restriction upon that right, or at least to confer a privilege upon the subject; and the question arises, as to the extent of that restriction or privilege. By stat. 25 Edw. III. c. 19, the subject (notwithstanding the King's ancient prerogative of granting writs of protection) was empowered to implead his debtor, and to proceed to judgment, with a stay of execution until the King's debt was satisfied: and it seems to me that this further privilege was granted by the 74th section of 38 Hen. VIII. c. 39, viz. that he should no longer be restrained from proceeding to issue an execution in those cases to which \*that section applied, viz. in which the Crown had neither commenced any suit nor awarded any process before

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his judgment was obtained. The Legislature did not, I conceive, intend to interfere in any cases of conflicting or concurrent executions, but simply to remove the restraint continuing upon the subject at the time of the passing of the Act of the 25th Edw. III., and to permit him to sue out execution without being guilty of any violation of the law, which before the stat. 33 Hen. VIII. he could not do. The section being silent as to which execution shall be first satisfied, imports only (according to my view of it) that the subject's execution may first issue, still leaving the prerogative right of the Crown to issue an extent unimpaired.

Supposing this to be the true construction of the statute, to what suit of the Crown does this 74th section extend? Does the proviso or condition control and override all the preceding clauses in the Act, or is it confined and limited in its operation to the subject-matter of the 73rd section immediately preceding? This question is involved in some obscurity. The collocation of the sections would favour the latter and more limited construction, but the words in the 74th section are sufficiently general and comprehensive to embrace other debts than those designated in the 73rd section as accruing to the King by "attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means." At the same time, if the restriction be construed to apply to every species of Crown debt, so as to include the obligations and specialties mentioned in the 50th section, it would involve the difficulty, nay absurdity, of supposing that an Act of Parliament, passed for the professed purpose of facilitating the speedy recovery of the King's debts, by giving them the force and effect of a statute staple, would, instead of \*expediting their payment, place the King in a more unfavourable position than any of his subjects. In every case between subject and subject, the point of time to determine the priority of execution is not the moment in which judgment is obtained, but that in which the execution is delivered to the sheriff; whereas the construction contended for by those who impugn the preferable title of the Crown, would give to the subject, in possession of a judgment, the power of postponing indefinitely the King's execution, unless there had been an inception of his suit, or an award of his

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process, before such judgment was signed. I interpret the word "debts" in this section (taking it with reference to all the previous provisions of the statutes) to mean such debts as, not being enrolled of record, are in *feri* only, unascertained, and remaining to be recovered through the medium of a suit to be commenced, or "process to be awarded," inasmuch as informations for penalties always conclude with a prayer that process may be awarded. This construction would also embrace such debts as are mentioned in the immediately preceding section; and unless the Crown had in all such cases actually commenced the suit, or awarded its process, the subject, having obtained a judgment, might proceed to issue execution, and thereby, in obedience to the language of the proviso, prevent the King from having first execution, to which before that statute he was entitled. I do not, however, read the clause as prohibiting the Crown from issuing an extent under the circumstances stated in this case. I come next to consider the question, whether, after seizure by the sheriff under a *feri facias* at the suit of a judgment creditor, the property in the goods taken becomes thereby altered, so as to be no longer liable to the extent of the Crown? The Crown claims to be entitled to priority in the execution of its \*process by virtue of its prerogative. The subject denies the existence of any such prerogative, asserting, that after the execution has once begun by an actual seizure made, the Crown has no longer any right to intervene, the subject's execution from that time being entitled to the preference. Upon this question the Crown, as representing the public in respect of the revenue, and an individual creditor, in right of his private claim, are at issue. For the subject, the cases of *Uppom v. Sumner* and *Rorke v. Dayrell*, and for the Crown, *Rex v. Wells* and *Allnutt*, and *Rex v. Sloper* and *Allen*, are relied upon as conclusive; and your Lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them. After the elaborate comment upon these cases, and upon all the authorities applicable to this subject, and upon the principles to be deduced from them, which your Lordships have heard from those who have preceded me, I shall state shortly the reasons which have determined me to prefer the latter judgments

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delivered by the Court of Exchequer, as containing the sounder exposition of the law, and as resting upon the more solid foundation. Any judgment pronounced by the Court in which Lord Chief Justice DE GREY presided, assisted by that great constitutional lawyer Sir WILLIAM BLACKSTONE, by Mr. Justice GOULD, and Mr. Justice NARES, presents, upon the first view, the strongest claim to the concurrence of any English lawyer; but I must confess, after weighing the reasons assigned, and the authorities upon which the judgment of the Court of Common Pleas in *Uppom v. Sumner* professes to be founded, I cannot yield my judicial assent to it. The whole argument upon the stat. 33 Hen. VIII., as reported in 2 Sir W. Blackstone's Reports, is comprised in this single observation, viz. \*that the former part of the 74th clause is declaratory of the old prerogative law, and the latter a new restriction, so that it shall not take place after judgment given for the subject. The authorities on which this judgment proceeded are still more unsatisfactory. The case of *Lechmere v. Thorougood*, as reported in Comberbach, 123, and 3 Mod. 236, is relied on as the prominent ground of the decision; which, together with *Attorney-General v. Andrew* (1), and the passage extracted from Lord Chief Baron Comyns' Digest, vol. 2, 538, viz. "if execution be upon a judgment against the King's debtor, and before *venditioni exponas* an extent comes at the King's suit, those goods cannot be taken on the extent," are referred to as comprehending the pith and marrow of the law embodied in this solemn judgment. As to *The Attorney-General v. Andrew*, Lord Chief Baron STEEL's judgment appears to have proceeded on the ground that the execution, which was an elegit, was perfect and consummated before the extent issued (2): he says, "the subject's title is prior to the King's, and is executed." And he adds, "*Stringefellow's* case, in Dyer, is unanswerable." And as to the passage in Lord Chief Baron Comyns' Digest, vol. 2, 538, I do not understand him as throwing the preponderating weight of his own great name into the scale to guarantee the credit of any decision where he cites cases to support it. Upon the authority, therefore, of the single case of *Lechmere v. Thorougood*, admitted by Mr. Justice GOULD to be a little obscure, from being reported

(1) Hardr. 23.

(2) Hardr. 27.

only piecemeal and in different books, is built the disputable, or, I would rather say, the untenable proposition, that after execution begun, but not completed, the King's extent comes too late. I have examined with care the several reports of this case in \*Comb. 123; 3 Mod. 236; 1 Show. 12, and 2 Vent. 160, from which it will appear, that the action was trespass by the assignees of a bankrupt against the sheriff of London and others, for seizing goods under a *feri facias* against the bankrupt after an act of bankruptcy committed by him. The act of bankruptcy was committed on the 18th of April; the seizure was on the 29th. After the seizure, an extent issued at the suit of the Crown. The case was twice before the Court, once in Trinity Term, 4 Jac. II., of which 3 Mod. gives the account; and again 1 W. & M., to which Comberbach and Shower refer: "The Court were of opinion a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time." The question, therefore, as to the right of the Crown to have the extent preferred to the execution, was not the point depending in judgment; and supposing Lord HOLT to have said what Comberbach imputes to him, viz. that the extent came too late after the *feri facias* delivered to the sheriff, it could be regarded only as an *obiter* and extra-judicial *dictum*. When the same question arose in *Rorke v. Dayrell*, as in *Uppom v. Sumner*, Lord KENYON, after expressing his perfect satisfaction with that decision, relied upon this proposition as the basis of his judgment, viz. that as long as the property of the debtor remained unaltered, and an execution at the suit of the subject, and an extent at the King's suit, issue against the debtor, the title of the Crown must prevail; for the point to be considered is, in whom is the property? He then proceeds to state, that as the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach. With great deference to the judgment \*of so profound a lawyer, I venture to question the soundness of this opinion, preferring the doctrine of Lord HARDWICKE, in *Lowthal v. Tonkins*(1), who says, "That neither before the Statute of Frauds, nor since, is the property in the

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(1) 2 Eq. Cas. Abr. 382.

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goods altered, but continues in the defendant until the execution executed. The meaning of these words, the goods shall be bound by the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." The same opinion was expressed by Lord HOLT, in *Smallcomb v. Cross* and another (1), who says, "if writ of execution be delivered to the sheriff against A., and A. becomes a bankrupt before it be executed, the execution is superseded; and, consequently, the property in the goods is not absolutely bound by the delivery of the writ to the sheriff. But the *teste* of the writ binds against all sales and acts of the party himself." The same point was decided in *Phillips v. Thompson* (2). Lord KENYON, in the judgment I am commenting upon, says, "the point to be considered is, in whom is the property?" I would try it by that test. If the property be not in the debtor after the seizure, and before the sale, I would ask, in whom is it? The debtor may, at any moment before the sale, pay the debt and demand the goods; nor is any bill of sale necessary to retransfer the property in order to confirm his title. Suppose the goods, whilst remaining in the custody of the sheriff, to be consumed by lightning or destroyed by fire, or by an armed tumultuary force, would the execution be satisfied or the debt discharged? surely not. The judgment of the Court of King's Bench, in *Thurston v. Mills* (3), furnishes a direct \*authority on this point. Goods were taken in execution by the sheriff under a *fi. fa.*, and whilst remaining unsold, an extent at the suit of the Crown, of a subsequent *teste*, issued, under which the sheriff took them, subject to the former seizure, and afterwards sold them under a *venditioni exponas* from the Court of Exchequer. Money had and received was brought by the plaintiff in the original action against the sheriff for the proceeds of the sale. Lord ELLENBOROUGH, in delivering his judgment observes, "neither the money nor the goods were originally, nor at the time of the action brought, the property of the plaintiff." The sheriff had indeed seized them under a *feri facias*, but the plaintiff acquired no property in them by the sheriff's seizure. If they had been burnt in the hands of the

(1) 1 Lord Ray. 251.

(2) 3 Lev. 191.

(3) 16 East, 254.

sheriff, the plaintiff would not have borne the loss. Lord KENYON concludes his judgment in *Rorke v. Dayrell*, in these words: "with respect to what is supposed to have been said by Lord MANSFIELD, in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLR's opinion in *Lechmere v. Thorougood*, it is as probable that the report of that observation is mistaken." If Lord KENYON, before he delivered his judgment in *Rorke v. Dayrell*, had fortunately referred to his own note of *Cooper v. Chitty*, which has since been published by Mr. Hanmer, from his Lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir James Burrow's report of Lord MANSFIELD's judgment in that particular. The notes of Lord KENYON and of Sir J. BURROW on this point are in such perfect harmony, that the one may be considered a *fac simile* of the other, and I will transcribe them. Lord MANSFIELD is reported by Sir J. BURROW to have said, "that Comberbach, in giving the judgment of the Court, which is the only \*sensible part of his whole report, (for it is plain to me that he did not understand the former argument on the former day, which is the first part of his report of the case,) agrees with Shower, and says, 'that the Court were of opinion, that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time;' but he must be mistaken in the first part of his report, for Lord Chief Justice HOLR could never say, that the property of the goods is vested by the delivery of the *fi. fa.*, and the extent of the King afterwards comes too late. No inception of an execution can bar the Crown." The following passage is extracted from Lord KENYON's report of *Cooper v. Chitty*, as published by Mr. Hanmer, p. 422: "This case of *Lechmere v. Thorougood* is reported in two other books: in Comberbach, 123, the latter part of the case is agreeable to that of Shower, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about, for he makes Lord HOLR say, what he could never say, about barring the extent of the Crown. In 3 Mod. it is as plain that the reporter misunderstood what passed, for he says, that the extent came too late, and that the property was bound by the *fi. fa.*, though

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the contrary is very clear." The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at common law by *fi. fa.* or *elegit*, is this, namely, that the extent of the Crown must be preferred if the execution be not perfectly executed by the delivery of the land to the creditor, or \*by the sale of the goods; that the inception of the execution by the bare seizure of the goods will not bar the Crown; that the execution must be no longer in progress but completed; and that until the actual sale the property is not altered or divested from the original owner. Mr. Baron Wood, in the elaborate judgment delivered by him in the Court below, and reported in 8 Price, 314, seems, throughout his most able argument, to admit, that in order to exclude the process of the Crown, the execution of the subject must be executed. But he insists that the act of seizure by the sheriff is for that purpose a full and final execution. But neither the cases he cites, nor his reasoning to illustrate that position, have succeeded in making me a convert to his opinion. *Curzon's* case (1), cited by that learned Judge, to shew that the prerogative of preference is determined when the subject's final execution has begun, proves, on the contrary, as it appears to my mind, that it is not determined until the subject's execution was perfect and consummated by the delivery of the land to the creditor under the *liberate*. The only point remaining to be considered, namely, whether the sheriff acquired by the seizure such a special property in the goods as to defeat the process of the Crown, has been so fully discussed by my learned brothers who have preceded me, and to whose judgment I take leave to refer (more especially to my brother ALDERSON's) as illustrating my view and incorporating my opinion on that subject, that I willingly spare your Lordships the fatigue of attending to my examination of it in detail. That the sheriff is invested with power, as the ministerial officer of the law, to protect the property whilst remaining in his custody, for the benefit of those who may be entitled to it, cannot \*be disputed. Against a wrongdoer, he may maintain trover or trespass; but from thence I apprehend no inference can be drawn unfavourable to the rights of the

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(1) 3 Leon. 239; 4 *ib.* 10.

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Crown. He may still be called upon to execute his Majesty's process of extent, subject to any legitimate claim of property in third persons previously existing and capable of being established. My brother ALDERSON has accurately defined the state and condition of such property as being in *custodia legis*. I will therefore dismiss this last head of inquiry with an observation of Lord HOBART'S, extracted from his judgment in *Sheffield v. Radcliffe* (1), when commenting upon *Stringefellow's* case (2), so often referred to. The passage is in these words: "Stringefellow sued an extent upon statute staple against Brownesoppe. The sheriff of Bedfordshire extended the land and appraised the goods, and seized them into the King's hands, but before *liberate* an Exchequer writ for a debt of 100*l.* of the King's, to be levied upon Brownesoppe, came to the sheriff, who returned on the writ this special matter into the Exchequer, and he made the same return into the Chancery upon the *liberate*, and that there were no other goods; yet he was enforced, notwithstanding the custody of the law, to serve the King." For these reasons, I am of opinion, that the King's extent is entitled of right to be preferred to the subject's execution, and that there is no solid distinction to be made between an extent in chief and an extent in aid.

I fear that I have rendered myself obnoxious to the imputation of trespassing too largely upon your Lordships' valuable time. My apology for doing so may be found in the importance and difficulty of the subject, which has for so many years been considered in Westminster \*Hall as *vexata questio*, distracting and dividing the opinions of the most enlightened Judges. If the judgment, which I have humbly submitted to your Lordships be deemed erroneous, I shall at least have the consolation of reflecting that I am under the shade of great authority, "*Magno se judice quisque tuetur*."

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GASELEE, J. :

My Lords, I have the misfortune to differ in opinion from those of my brothers who have preceded me, and I understand from a great majority of those who are to succeed me in addressing your Lordships upon this occasion; and when I consider, that the two

(1) Hob. 339.

(2) 1 Dyer, 87.

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noble and learned Chief Justices, to whom this case was referred upon a writ of error, brought to review a judgment which was given in the Court of Exchequer in favour of the defendant in error, reported to the Lord Chancellor, that the question was one which has agitated the Courts of Westminster Hall for a great many years; that there had been a difference of opinion in the Courts of Westminster Hall, the Court of King's Bench in one case, and the Court of Common Pleas, in another having decided that the extent was not entitled to priority over the execution at the suit of the subject; that the Court of Exchequer has uniformly decided the other way, viz. that the extent was entitled to priority; and that their Lordships having heard the case argued, and considered it very maturely, had not been able to come to a decision upon the subject and agree upon what advice they should give to the Lord Chancellor; I am a little surprised that so considerable a majority of the Judges should have formed an opinion adverse to that which is the result of the best consideration I have been able to give to the subject.

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The first question propounded by your Lordships for the opinion of the Judges, branches out into two; viz. first, whether the property is altered by the seizure of the sheriff under the writ of *fiery facias*; and secondly, whether the statute 33 Hen. VIII. c. 89, s. 74, abridges the prerogative process of the Crown, and prevents it from taking effect, unless it be issued antecedently to the subject's execution, or, in the words of the statute, unless the King's suit be taken or commenced, or process awarded for the debt at the suit of the King, his heirs and successors, before judgment given for the other person or persons. In considering the first of these questions, I would call to your Lordships' attention, that the question in this case is not, as in many of the cases in which the decision has been given in the Court of Exchequer in favour of the Crown, whether the claimant has such a property in the goods as to enable him, according to the technical practice of the Court, to come in and claim the property under the usual rule, upon the return of the writ and inquisition into the Court: in which case no one can be allowed to traverse the King's title without shewing title in himself: but here the question is generally, whether the writ shall be executed by the

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sheriff, by extending the same goods into the King's hands and selling them to satisfy the Crown debt, without regard to the *fi. fa.*, under which he had first seized them. It is admitted, and indeed after the decision in *Swain v. Morland* (1), it is too late to deny, that after an execution is once executed at the suit of a subject, an extent coming to the sheriff on the part of the Crown to be executed on the same property, comes too late. One question, therefore, on this case is, at what time may an execution be said to be executed? Now, my Lords, there \*are many authorities which lay it down, that by the seizure (the sale being but the formal part of the execution,) the property vests in the sheriff. The first authority I shall trouble your Lordships with on this point is the opinion of Lord HOLT, in the case of *Lechmere v. Thorougood*, reported in several books, and amongst others in Comberbach, 128, in which Lord HOLT is stated to have said, "the property of the goods is vested by the delivery of the *fi. fa.* and the extent afterwards for the King comes too late, and that, on the Statute of Frauds and Perjuries." It is true the case does not appear to have been decided on that ground, but because the taking being lawful at the time, the officer could not be made a trespasser by relation; and that Lord MANSFIELD in *Cooper v. Chitty*, says, that the reporter must be mistaken in the first part of the report. In *Rorke v. Dayrell* (2) Lord KENYON is stated to have said, with respect to what is supposed to have been said by Lord MANSFIELD in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLT's opinion in *Lechmere v. Thorougood*, it is probable that the report of that observation is mis-stated. But in the *Banker's* case (3), Lord HOLT says, as soon as a *fi. fa.* is delivered to the sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes the debtor to the plaintiff. The case of *Clerk v. Withers* is also to the same effect. That case is as follows: F. Dives, as administrator of J. Dives recovered 303*l.* against Clerk, upon a bond to his intestate, upon judgment by default in the Common Pleas, and sued out a *fi. fa.* tested of Trinity Term, 1 Ann., returnable in Michaelmas Term, directed to the sheriffs of London, which

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(1) 21 R. R. 651 (1 Brod. & B.  
370; 3 Moore, 740).

(2) 2 R. R. at p. 421 (4 T. R. 412).

(3) 11 State Trials, 28.

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was delivered to the sheriffs on the 1st August in the same year, who on the same 1st August seized goods to the value. F. Dives, \*the administrator died 9th September following. The sheriff returned the seizure to the value *sed remanent, &c., pro defectu emptorum*. On the 29th September, the sheriff was removed and another put in. Defendant Clerk now sued out a *sci. fa.* against the then sheriff, for restitution of his goods, and upon demurrer, judgment was given against the plaintiff in the Court of Common Pleas, and he then brought a writ of error; and now the case having been twice solemnly argued at the Bar, the Court *seriatim* affirmed the judgment. Mr. Justice GOULD says, “the execution is ‘executed in the life of the administrator, and the sale, namely, the formal part of it may be done by the same writ. The sheriff, by the levying the goods by a *fi. fa.* as he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner, if he gets them; and so he may have trover, as appears in *Wilbraham v. Snow*, where Chief Justice KELYNCE held, that he gains a general property; but all the rest say, that it was only a special property, so as to sell, &c. This is not like the case put before, of an extent; for in that case there must be a *liberate*, which is by award of the Court.” Mr. Justice POWYS says, “this execution is so far completed, that it is a vesting of the property in the sheriff. The selling is but a formal part of the execution, and by the seizure and writ, he has authority to sell; and the *venditioni exponas* adds not to his authority, but is to spur him on to sell.” And Mr. Justice POWELL says, “execution is an entire thing; and, therefore, where a sheriff levies goods, and while they remain in his hands for sale, a new sheriff is chosen, he who begins the execution shall go on with it and sell the goods, and not deliver them over to the new sheriff, who is the officer of the \*Court. The reason is, that execution is one entire thing, Year Book, 34 Hen. VI. pl. 36; and, therefore, where it began it shall end, and that is the reason that a *supersedeas* after execution begun shall not supersede it upon error, because it is an execution from the first levying of the goods, and not like the case of an *extendi facias*, because the extent is only a seizure into the King’s hands, and there must be another award of the Court, namely, a *liberate* to

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deliver them over to the plaintiff." By HOLT, Ch. J.: "It is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods and to make a return; and when he has made a return of the seizure of the goods, and that they remain in his hands for want of buying, that is not a discharge of the command of the writ, but only an excuse that he has not the money, and he is compellable by law to bring it in; and though a *venditioni exponas* does lie, yet a *distringas* is the proper remedy; and there are two sorts of *distringas nuper vicecomitem*, before mentioned, Year Book, 34 Hen. VI. pl. 36. The one a *distringas* to the new sheriff to distrain the old one, to sell the goods and bring the money into Court; the other to distrain him to sell *et denarios inde provenientes*, to deliver to the new sheriff to bring into Court. Now, if a *distringas* lies to the new sheriff to compel the old sheriff to sell, that shews the old sheriff has an authority to sell by virtue of the former writ; and that which commands the new sheriff to distrain, the old one to sell and bring in the money, is the most usual (1). Now then, since the sheriff is compellable to sell, having seized the goods, what should hinder, in this case, that he should not sell, \*notwithstanding the plaintiff's death; for the writ is as forcible and compellable upon him to levy and bring in the money as if the plaintiff had lived. When he seizes the goods by virtue of the writ, the defendant is actually discharged, though they are not sold, for the plaintiff must depend upon his execution, and rely upon that; he has no further remedy against the defendant, but altogether against the sheriff. This came in question upon an ejectment brought by an administrator *de bonis non*; and it was held, that the extent was void, for the writ was abated, and no matter whether the plaintiff died before the return of the seizure or after. But in case there be no act of the Court to be done, but an *elegit* sued out, which commands the sheriff to deliver the lands extended to the party; if, there, the executor or administrator die after the inquisition and before the delivery, in that case the death of the plaintiff shall not avoid the execution; and that appears by the case of *Harrison v. Bowden*, though not so very plain." If he do not sell between the *teste* and return

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(1) Rastell's Entr. 164; Thes. Brev. 90.

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of the *distringas*, he shall forfeit issues; and after goods once seized, no writ of error or *supersedeas* shall stay the sale. In *Wilbraham v. Snow*, the point was, that the sheriff may maintain trespass or trover against any person who takes away goods which he has seized in execution: *Mildmay v. Smith*; and by seizure of the goods in execution, the sheriff has property in them, so that he may re-seize them, and sell when he is out of office as before. In the case of a *fi. fa.* there is no further act to be done. Although the terms of the writ direct the sheriff to bring the money into Court to render to the plaintiff, it is not necessary he should do so. He not only may pay it over himself to the plaintiff, but in the case of *\*Parkinson v. Guildford*, it is said, an action of debt may be maintained against him or his executors if he does not do so after he has sold the goods. It is true that authorities have been cited on the other side, and amongst others: *The King v. Peck* (1). In that case a *fi. fa.* issued out of the Court of Common Pleas at the suit of *Robarts v. Peck*, which was tested 8rd of April, by virtue of which the sheriff levied the goods, &c. but before the sale thereof; or the return of the writ, an extent came to the sheriff at the suit of the Crown, to levy the goods, &c. of Peck, tested 2nd of May. The sheriff returned this special matter on the *fi. fa.*, and likewise upon the extent, into the Court of Exchequer, on which it was said, that Peck had possession of the goods the 30th of April, on which Mr. A. moved to quash the inquisition, and Mr. F. moved that the sheriff might amend his return. Baron PRYCE was for quashing the inquisition, which being found by a jury, he did not see how the sheriff could amend it. The Lord Chief Baron BURY and Baron MONTAGUE were of opinion the sheriff might amend his return, and an order was made for that purpose, which was what the sheriff wanted to indemnify him, in case anything had been moved against him in the Common Pleas on the return of the *fi. fa.* There is a note in that case in these terms, "Take notice, it was taken for granted, that though the goods were levied by virtue of the *fi. fa.* three days before the *teste* of the extent, yet there was no bar to the Crown; but *quere*, if they had been sold, for then execution had been

(1) Bunb. 8.

executed." *Stringefellow's* case has also been very much relied upon on this part of the case, as an authority on the part of the Crown. That case is thus reported in Dyer, 67 b. [The learned Judge here quoted the facts of that case:] "And it was \*holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, to return the extent into the Exchequer for the service of the King's debt; and Justices HALL and BROMLEY were of the same opinion, because the property of the goods and land was not in Stringefellow before delivery to him by the writ of *liberate*." The distinction, however, between that case and the case of a *fi. fa.* has not only been very fully pointed out in the opinions of some of the Judges in the case of *Clerk v. Withers*, above cited; but is also very pointedly observed upon by Mr. Baron WOOD, in the case now in judgment, in 8 Price, 314. It is, that the extent is not the execution, and gives no authority to the sheriff to sell or deliver over to the party; it merely authorizes the sheriff to seize the property, but not to do anything with it until the *liberate* issues, which is in fact the execution. The *fi. fa.* commands the sheriff to make the money of the goods. No further authority is requisite to empower the sheriff to sell and to pay the money over to the plaintiff. This distinction is also shewn in *Playne's* case, in Cro. Eliz. 47. "A lessee for years was obliged to pay his rent. In debt upon it he pleaded that the lessor was bound in a statute, and upon that, an *extendi facias* was awarded to seize the lands and tenements of the lessor into the Queen's hands, which was executed accordingly, and upon that a *liberate* was awarded, and in the mean time between the *extendi facias* returned and *liberate* awarded, the rent was incurred, for which he was chargeable to the Queen, and demands judgment." The opinion of the whole Court was clear to the contrary. Before the *liberate* awarded *nihil operatur*, for he remains always tenant to the lessor, and chargeable to him for his rent; and the writ before is but of form, \*when it speaks of the seisin into the Queen's hands, for it is never seen that lands were seized upon that writ. So that here, upon an *extendi facias*, it is clearly held that nothing was divested out of the debtor until the *liberate*. In *Smallcomb v. Cross* (1), which has

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been cited on the part of the Crown, there is the following note. "In this case, Mr. Northey said, *arguendo*, that it is the common practice at this day, that if a *fi. fa.* be delivered, and the goods appraised and sold, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will overreach the former sale; but, *per curiam*, it is a very dangerous practice." It is, however, now admitted, that the sale would bar the Crown; and I only mention this note to shew how far the argument has in earlier times been carried in support of the alleged rights of the Crown. A passage at the end of the case of *The Attorney-General v. Capell*, was also cited on the other side, viz. "extents have been on goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This passage does not appear to be part of the judgment of the Court in *The Attorney-General v. Capell*, in which the question was, whether the extent was too late coming after the commission of bankruptcy but before the assignment. There is nothing in the case wanting, or in any way calling for the inference, which, as Mr. Baron Wood says, in his judgment, is a mere *gratis dictum* of the reporter of that case.

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The result of a due consideration of the foregoing cases seems to me to be, that the property is altered, and the Crown barred by the levy under the *fi. fa.* It is not necessary to go the length of shewing that \*the sheriff has the general property in the goods. There are several cases which shew, that where the general property remains in the debtor, yet if another has any special property in or lien upon the goods, the Crown shall not take the goods but subject to that lien. Thus, an equitable mortgage which binds the Crown, and against which the Crown is entitled only upon satisfaction of the lien of the mortgagee to its full extent: *Casperd v. The Attorney-General*: or the lien of a factor, who has accepted bills to the amount of the value of the goods consigned to him; *Rex v. Lee*: or of a wharfinger, on the goods of his customer in his possession for his general balance, which has been decided to be available against the Crown: *Rex v. Humphery* (1). Mr. West's Treatise on Extents, p. 98, says, the

(1) 29 R. R. 783 (1 M'Clelland & Younge, 173)

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plaintiff in an execution may be said to have an interest in goods which have been taken under his execution, the goods being under the custody of the law, and the sheriff having the special property in them, the general property remaining in the defendant under the execution. But it is said that that rule cannot apply to the case in question, because at any time before sale, and after the seizure, the debtor may, by payment of the debt, suspend the sale and stay execution. The same answer would apply to the case of the factor, wharfinger, and other persons above named, in all which the debtor, upon payment of the debt, regains the property.

If the decision on this part of the case is in favour of the plaintiff in error the remaining question will not arise, but if not, I am of opinion that the stat. 38 Hen. VIII. c. 39, s. 74, abridges the prerogative process of the Crown, and prevents it from taking effect in this case, the King's suit not having been taken or commenced, or process awarded at his suit before judgment on the *fi. fa.* The following are the words of that section: "And be it also enacted by the authority aforesaid, that if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said sovereign lord the King, his heirs and successors, shall have first execution, so that the King's suit be commenced before judgment given for the said other person or persons." Before proceeding to the further consideration of this part of the case, I should call your Lordships' attention to the fact that, in the present case, so far from the King's suit being taken or commenced, or process awarded before the judgment was given for the other person, the debt was not due to the King but to the debtor of the King's debtor, and was not put on the record until after the giving the judgment, the issuing of the *fi. fa.*, and the actual seizure of the goods under it. In the case of *The Attorney-General v. Andrew*, it was determined by all the Court that the statute did abridge the prerogative. The case was, Sir William Harrison acknowledged two judgments in debt to one Andrew, upon bond, and was bound to one Feilder on

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a bond bearing date before the judgments. Feilder assigned his debt to the King, Andrew takes out execution upon his judgments, viz. two elegits; by one he has the moiety, by the other the other moiety of Sir W. Harrison's lands extended. Then process issued out of the Exchequer for the debt assigned to the King, and the principal question was, whether or no the King should be preferred in this case? After argument, the Court, in Trinity Term, 1656, gave judgment for defendant. Baron PARKER said—"The King has many prerogatives, *pro bono publico*, but in the case in question, the statute 33 \*Hen. VIII. abridges the prerogative, and controls the common law; affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied, see *Stringefellow's* case, in Dyer, 67 b; also *Lassel's* case, in Dyer, 364." Baron NICHOLAS agreed, "before the statute 33 Hen. VIII. the King was not bound, but the statute has made an alteration, though it sounds in the affirmative, for it enacts a new thing, and *ita quod* makes a condition precedent and a limitation." He then refers to certain authorities, as shewing how such statutes are to be expounded, and that the clause would else be idle. Chief Baron STEEL—"The subject's title is prior to the King's, and is executed; the words of the statute 33 Hen. VIII. are introductory, *Cecil's* case (1), and *Stringefellow's* case, are unanswerable." It is observable, that although so much stress is laid on *Stringefellow's* case on the part of the Crown on this occasion, Chief Baron STEEL and Baron PARKER, in the above case of *The Attorney-General v. Andrew*, cite it as being conclusive in favour of the subject. The case of *Uppom v. Sumner* (2), is precisely the same as the present. Uppom, the plaintiff, in Easter Term, 17 Geo. III., recovered a judgment against Cann in the King's Bench, in debt, for 1,020*l.*; and on the 16th of April, 1777, sued out a *fi. fa.* returnable on Monday next after the morrow of the Ascension, 12th of May; a warrant on which was, on the 18th of April, delivered to the officer, who on the same day took the goods, and kept possession of the same by virtue of the warrant. On the 24th of April, before any sale of the goods, an extent was sued out, and delivered to the sheriff, against the

(1) 7 Co. Rep. 18 b.

(2) 2 Bl. 1251, 1294.

goods of Cann, to levy 62*l.* 4*s.* 9*d.*, a debt to the King; and a warrant was on the Monday delivered to the \*same officer, who then had the goods in his possession under the former warrant, and who two days after had the goods appraised, and on the 30th of April took an inquisition on the extent, the plaintiff Uppom's attorney attending and putting in his claim. The goods were sold on the 23rd of May, and the sheriff being called upon by Uppom to return his writ, returned *nulla bona*. When the cause was first called on, the plaintiff's counsel thought they could not support their case, and accordingly judgment was given without argument. It was, however, afterwards argued, and after time to consider, Mr. Justice GOULD delivered the unanimous opinion of Chief Justice DE GREY, who was present at the argument himself, and Justices BLACKSTONE and NARES, that in this case the extent did not take place of the execution, the King's suit being commenced after the judgment. It had been contended in argument by *Mr. Serjeant Grose*, who afterwards was one of the Judges, and agreed with the rest of the Court in the judgment in *Rorke v. Dayrell*, that the statute 33 Hen. VIII. only restricts the prerogative in the particular Revenue Courts erected by and mentioned in that Act. But in giving judgment, Mr. Justice GOULD, after stating the particular parts of the Act, says, about seven sections only, viz. sections 50, 74, 75, 76, 77, 78, and 80, contain general provisions, extending to all the King's subjects, and are applicable to all the King's Courts, as well as to the courts of revenue, where the subject of them falls under consideration. Indeed, he says, it would have been absurd to have one law prevail in the King's Bench and Common Pleas, and another in the Exchequer and Duchy, with regard to such questions as the present, the priority of the King's debts before those due to a subject. The learned Judge, after stating the 74th section \*of the Act, says, "the former part of this clause is declaratory of the old prerogative law, the latter is a new restriction of it, so that it shall not take place after judgment given for the subject." With respect to the case, *Lechmere v. Thorougood*, upon which so much has been said, he said, "in *Lechmere v. Thorougood*, it appears by Comberbach, 123, and 3 Mod. 236, that first HERBERT, and then

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HOLT, were clearly of opinion, that after execution begun, but not completed, (and of course after judgment signed,) the King's extent came too late." This case is a little obscure from its being reported only piecemeal, and in different books, but with some attention it will be found to be clear and consistent; by reading the several parts of it in order of time as they occur; viz. the pleadings, 2 Jac. II. (1); first argument, 4 Jac. II. (2); second argument and judgment, 1 W. & M. (3); and a subsequent action between the same parties in effect in the Common Pleas, viz. *Lechmere v. Toplady* (4). In *The Attorney-General v. Andrew* (5), it was held by the Court of Exchequer, that when there was a judgment and execution by *elegit*, a debt of the King prior to the judgment, but the process thereon sued out after, it should be postponed to the judgment. And from these authorities Lord Chief Baron Comyns, in his Digests, collects this doctrine, that if execution be upon a judgment against the debtor, and before *venditioni exponas*, an extent comes at the King's suit (which is the very case at bar,) those goods cannot be taken on the extent; and this opinion is also supported by *Rex v. Dickinson* (6). The case of *Rex v. Dickinson* was this: A. was indebted by judgment to B., by bond to C. and D., and by simple \*contract to E., and died. E. being a debtor to the King caused the debt due to him to be seized into the King's hands, and upon this a *scire facias* issued against Dickinson, executor of A.; and before the return of it, C. and D., the bond creditors, obtained judgment; and then Dickinson pleaded to the *sci. fa.* the prior and the subsequent judgment. The *Attorney-General* demurred. The points argued in Hilary Term, 1691, were first, whether the subsequent judgment should be preferred to the King's debt, for it was admitted that the preceding judgment should be preferred. The second is unnecessary to state. This case was adjourned to this Term (Easter, 4 W. & M., 1692,) when it was adjudged for the King, that his debt should be preferred before the subsequent judgment, namely, before any bond (5);

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(1) 2 Ventr. 156.

(2) 3 Mod. 236.

(3) Comb. 123, 1 Show. 12.

(4) 2 Ventr. 169.

(5) Hardr. 23.

(6) Parker, 262.

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but a precedent judgment should be preferred before it, upon the words of the 26th s., 33 Hen. VIII. c. 39. "So always that the King's suit be taken and commenced, or process awarded for the debt of the King, before judgment given for the other persons." In *Rorke v. Dayrell* (1), the plaintiff sued out a *fi. fa.* returnable on 12th January, 1788. The writ was delivered on the 7th January to the sheriff, who on the 8th seized the goods. Before the sale, namely, on the 11th, a writ of extent issued tested on that day, and on the 12th it was delivered to the sheriff, who acted under the extent, and returned *nulla bona* to the *fi. fa.* The case was argued on the statute of the 33 Hen. VIII. c. 39, s. 74. The Court were unanimously of opinion that the extent came too late. Lord KENYON states— "Where the King and a subject stand in equal degree, there is no doubt but that the King's prerogative must prevail, and therefore, where the property of the goods remains in the \*King's debtor at the time, and an execution at the suit of the King and another at the instance of the subject are sued out, the former will be preferred. On this principle the case of *Rex v. Cotton* (2), proceeded: that was not the case of an execution, but a distress; the goods taken were *in custodia legis*, as a pledge to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. Now, in this case, the sheriff had actually seized the goods under the plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing a commission of bankrupt against the debtor; and in this respect, I know no distinction between the case of the Crown and that of a subject. As to the stat. 33 Hen. VIII. c. 39, s. 74, either it did or it did not give some new privilege to the Crown. If the counsel for the Crown contend that it did, they must take the word 'execution' as referring to personal chattels, and then the words are against the King, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the Crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the King and a subject stand in equal degree, and the property is not

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(1) 2 B. R. 417; 4 B. R. Pref. vii. (4 T. R. 402).

(2) Parker, 112.

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altered, then the former shall prevail. With respect to what is supposed to have been said by Lord MANSFIELD in *Cooper v. Chitty*, of Comberbach having mistaken Lord HOLT's opinion in *Lechmere v. Thorouggood*, it is as probable that the report of that observation is mis-stated." Justice ASHHURST says, "The case of *Uppom v. Sumner* certainly underwent a great deal of consideration before it was decided; all the prior authorities were thoroughly examined at that time. \*Unless,

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therefore, it could be shewn that the case proceeded upon wrong principles, it ought to govern the present. The words of the stat. Hen. VIII. are clear and decisive, that the King's suit shall be preferred to that of any other person. So always that the King's suit be taken or commenced, or process awarded before judgment be given for the said other persons. Now this Act of Parliament gave a new prerogative to the King in various instances which he had not had before; by that he is enabled to issue immediate execution in cases which he could not before, for before he had only a right to such execution when the debt was upon record. And as this was a new prerogative, the Legislature had a right to restrain him; and they have in express terms restrained him where the subject's judgment is prior to the inception of the King's execution." Mr. Justice BULLER says, "This case arises on the stat. 33 Hen. VIII., for previous to that Act the Crown could not issue immediate execution on a bond debt. Though the cases that have already happened on this statute shew that the Act is not to be confined to bond debts only, but that it extends to all debts and executions. It is so stated, in express terms, by Lord Coke, in *Sir T. Cecil's* case(1). If this Act of Parliament be restrictive on the Crown, it goes a great way to determine this question, for if it be, it expressly requires that the King's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case in *Hardres*, where the whole Court were of opinion, that the statute does abridge the King's prerogative. And there Chief Baron STEEL said, 'the subject's title is prior to the King's, and is executed.'

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On this ground, I put the question to the \*counsel in argument,

(1) 7 Co. Rep. 18 b.

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'What effect a judgment obtained by a subject would have, where he lay by till the King's extent was executed.' I am inclined to think, that in such a case the execution by a subject would be postponed; but it is not necessary to decide that point in the present case. As to the effect of the statute 38 Hen. VIII. c. 39, it is impossible to have a more direct authority for the restriction on the King's prerogative than in 7 Rep. 19 b, where it is said, 'The Act hath given a benefit and advantage to the King; first, in making every bond made to the King in nature of a statute staple; secondly, in giving remedy to the King himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of execution for all his debts; fifthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor;' and, therefore, it was the intent of the Act, to gratify the subject, and where a new provision was made for the levying of the King's debts in a more speedy and beneficial manner than the King had before, the subject also should have some new benefit which he had not before. Now that new benefit was, to give him a preference in cases where his judgment was obtained before the extent of the King issued." Mr. Justice GROSE says, "the simple question is this, whether the King's right of issuing an extent upon a bond, supersedes a prior judgment of a subject. If the Crown have such a right, it must arise upon the statute of 38 Hen. VIII. c. 39, s. 74(1). Now the words of this clause in the Act are extremely pointed to shew, first, what the King's prerogative was before; secondly, how far the prerogative was intended to be assisted in these cases, and how far to be limited. But it is said, \*that 'execution' in this Act was intended only to affect lands. But there is no reason why it should be so confined; it must mean every kind of execution to which the King was entitled before the passing of this Act, otherwise the King would be bound in cases where he had a prerogative before. Thus, this case stands on the words of this statute. The authorities also are decisive; first, the case in *Hardres* is very pointed; and there it was not even hinted that execution in this Act ought to be confined to an execution against land. Then came the case

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of *Rex v. Dickinson*, and Lord Chief Baron COMYNS (1) drew this conclusion from the cases, that, if execution be upon a judgment against the King's debtor, and before a *renditioni exponas*, an extent comes at the King's suit those goods cannot be taken on the extent. Therefore as well on the decisions as on the construction of the statute 33 Hen. VIII., the plaintiff is entitled to recover." After the decision of these two cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, come the case of *Rex v. Wells* and *Allnutt*, in the Court of Exchequer, which as to the point upon which the Court delivers their judgment, for there was another upon which the case might have been put, was precisely similar to the present. The Court of Exchequer gave judgment for the Crown; and such has been the practice of that Court ever since. That case, however, was principally founded upon the case of *Rex v. Cotton*. The principle on which that case was decided, being stated in the judgment of the LORD CHIEF BARON in *Rex v. Wells* and *Allnutt*, to be, that if the King's execution bore *teste* before the property was altered, it bound that property. The case, however, of *Rex v. Cotton* arose upon a distress, and not upon an execution, which I apprehend, and it is so stated by Lord \*KENYON in his judgment of *Rorke v. Dayrell*, makes a material difference; the sheriff, in the case of seizure under an execution, having in my judgment at least a special property in the goods. In the case of *Rex v. Wells* and *Allnutt*, the LORD CHIEF BARON relied much on *Stringefellow's* case, the difference between which and the present case I have already pointed out, viz. that in that case, the *liberate* is the execution, and was not issued until after the issuing of the Crown process. The question was afterwards brought before the King's Bench, in *Thurston v. Mills* (2), and twice argued, and the Court were prepared to give their judgment; but on the day on which it was to have been given, they suggested a doubt as to the form of the action, and directed a third argument upon that point only, upon which they gave their judgment against the plaintiff. What the judgment was which the Court were prepared to give upon the general question, it is impossible to say. It is not probable that it was in favour of the defendant, or at least unanimously so, for if so,

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they would probably have put the question at rest for ever. It is not likely the Court would have raised another question, and have given their judgment upon the question so newly raised. With respect to the observation which has been made, that if the statute were to be construed literally, the Crown would be in a worse situation than the subject, if the King's suit must be commenced before judgment given for the subject; for then, if the subject's judgments be first, he would have preference, though his execution were last, which is not the case even between subject and subject. I apprehend the true answer to that observation is, what was suggested by Mr. Justice BULLER, in his judgment on *Rorke v. Dayrell*. He thought it unnecessary to decide on that \*particular case, viz. that in case of a *laches* or delay on the part of the subject, his execution would be postponed. I believe, by looking to the writ of extent itself, it will appear by the terms of it that it is issued by virtue of this statute. Without trespassing further, therefore, upon your Lordships' time, my humble answers to your Lordships' questions are, first, that this writ of extent shall not be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown debt, without regard to the writ of *feri facias*, under which he had at first seized them; and secondly, that all other things remaining the same, it makes no difference whether the extent was in chief or in aid.

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LITLEDALE, J. [gave a judgment, arriving at the same result and upon somewhat similar arguments, with the judgment of Mr. Justice GASELEE.]

BAYLEY, B. :

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The question proposed for the consideration of the Judges is in substance this, whether, if the sheriff has seized the goods of a debtor under a *feri facias*, and those goods remain unsold in the sheriff's hands, they are liable to an extent of the Crown, tested after such seizure, and may be seized and sold to satisfy the Crown's debts, without regard to the writ of *feri facias*? and I am of opinion that they are so liable. The writ of extent directs the sheriff to inquire what goods and chattels the King's debtor,

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against whom it issued, had in his bailiwick at the time it issued, and to take and seize the same into his hands, there to remain until the King's debt be satisfied. The question then is, whether, by the seizure under a *feri facias*, the goods so seized cease, as against the Crown, to any and what extent to be the goods and chattels of the debtor, or whether the Crown is not entitled to treat them as the goods and chattels of the debtor, to all intents and purposes, and to the same extent, as if there had been no seizure under the *feri facias*?

\* \* \* \* \*

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Considering that the property in goods is not altered merely by a seizure under a *feri facias*; considering that 33 Hen. VIII. c. 39, s. 74, does not apply to the case of conflicting executions between the Crown and a subject, where the Crown's extent is issued while the goods are in the hands of the sheriff under a *feri facias*, at the suit of a subject; considering, according to Lord Chief Justice TREBY's note in Dyer, 67 b, this very point is described as acted upon in 24 Eliz. (1582); considering \*that DODDRIDGE, J. lays it down as clear law, 20 Jac. I. (1624); and that it is noticed as such in 1686 and 1697, in *The Attorney-General v. Capell* (1), and *Smallcomb v. Buckingham* (2); considering Bunbury's note upon the point, 1716, in *Rex v. Peck*; that Lord Chief Baron GILBERT refers to it as settled and indisputable, in his Exchequer Treatise; that Lord Chief Baron PARKER considers it as law in his elaborate judgment in *Rex v. Cotton*; and that it has since been solemnly decided in *Rex v. Peckham*, or *Rex v. Wells* and *Allnutt*, and acted upon in *Rex v. Sloper* and *Allen*; considering that 33 Hen. VIII. is never mentioned as bearing upon the point until *Uppom v. Sumner*, and is shewn to be inapplicable by *Rex v. Peckham*; considering the analogy furnished by *Stringefellow's* case, by *Rex v. Dale*, and *Rex v. Cotton*, in cases of distress; and by *The Attorney-General v. Capell*, and *The Attorney-General v. Hanbury*, and *Brassey v. Dawson*, in cases of bankruptcy: I am of opinion, that if the sheriff seizes goods under a *feri facias* at the suit of a subject, and if, while the goods he seized remain in his hands, an extent issues at the suit of the Crown, those goods are liable to the Crown's extent. Upon the

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(1) 2 Show. 481.

(2) 5 Mod. 376.

second question, "does it make any difference whether the writ of extent was in chief or in aid?" I am of opinion, it does not. *The Attorney-General v. Capell* was an extent in aid.

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TINDAL, Ch. J. :

The questions proposed by your Lordships have been so often adverted to by the learned Judges who have preceded me in delivering their opinions, that it is altogether unnecessary to refer to them. I shall content myself therefore with saying that, upon the first question proposed by your Lordships, I agree in opinion with the \*majority of the Judges, that the extent in aid, tested and delivered to the sheriff after the seizure by the sheriff under the *fi. fa.*, but before the sale under such writ, is, by law, to be first executed by the sheriff, without regard to the writ of *fi. fa.*

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Upon the second question proposed by your Lordships, I shall say no more than that it appears to me to make no difference whether the extent is an extent in aid or an immediate extent at the suit of the Crown; all the authorities agreeing that the same privileges extend to the one which belong to the other.

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I have the authority of Mr. Justice PARK, who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of his Majesty's Judges.

LORD TENTERDEN :

My Lords, in the case between Daniel Giles, the late sheriff of the county of Hertford, plaintiff in error, and Harry Grover and James Pollard, defendants in error, which was argued some time ago before your Lordships, the learned Judges have given their answers to certain questions that were proposed to them by the House. By these answers a very great majority of the Judges coincided in that opinion upon which I propose to submit to your Lordships that the judgment of the Court of Exchequer should be affirmed, two only being of a different opinion. The case may be shortly stated thus: An execution having issued at the suit of a subject, the sheriff took possession of the goods of the debtor, but before he made any disposition of those \*goods by bill of sale to the creditor, or in any other way, an extent came at the suit of

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the Crown; and the question is, whether an extent thus coming at the suit of the Crown, while the goods remain in the hands of the sheriff, is to be preferred to the execution taken out by the subject. The majority of the Judges on the question proposed are of opinion in the affirmative, namely, that the Crown's extent should be preferred. It is in conformity with that opinion, in which I most heartily concur, and have long entertained—for the subject is by no means new in the courts of justice—that I shall take the liberty of delivering my opinion, that the judgment of the Court of Exchequer should be affirmed.

As I have already stated, the question has arisen more than once in courts of law; and there are two recorded decisions, in two cases so often alluded to, upon the subject, one, the case of *Uppom v. Sumner*, decided in the Common Pleas several years ago; and the other, the case of *Rorke v. Dayrell*, decided in the Court of King's Bench, after the determination of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say, that there have, since the last of them, namely, the decision of *Rorke v. Dayrell*, by the Court of King's Bench, been two or three in the Court of Exchequer to the contrary of those two prior decisions.

Your Lordships well know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the Crown. It is their peculiar duty to attend to and enforce the rights of the Crown against the subject as connected with that revenue.

[ \*218 ] The two cases which are reported, and which are against the rights of the Crown, appear to have proceeded \*upon two grounds; one ground was, that by the seizure of the sheriff the property of the goods was divested out of the debtor; another ground was, that, according to the true interpretation of the statute passed in the time of Henry VIII. the execution of the Crown was not to be preferred.

Now, with regard to the first point, namely, the supposition that the property was divested out of the debtor by the seizure of the goods, by the act of the sheriff in seizing the goods, it appears to me, upon due consideration, and so the majority of the Judges thought, that the proposition could not be maintained. Property

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cannot be divested out of one person without being vested in another ; and it is impossible to say in whom the property does become vested, if the investment be taken out of the debtor. It has been argued that the property is vested in the sheriff, because there are authorities to shew that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrong-doer. These actions are maintainable upon a ground perfectly distinct from the right of property, they are maintainable upon the ground of possession ; any man in possession of goods, whether as the bailee or otherwise, may in his own name maintain an action against any party who shall deprive him of the possession. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff.

It has been supposed by some that the property is in the judgment-creditor ; but it is perfectly clear, upon consideration of the subject, that the judgment-creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment-creditor \*obtains the property ; but until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested some ceremony would be necessary to revest it ; but there is no such ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws ; he executes no conveyance ; he does not even go through any ceremony ; but all he does is to withdraw, and leave the goods where they were. It appears to me, therefore, that putting the case shortly upon that ground of a supposed divesting of the property, it can by no means sustain the two cases which I have referred to, and which were decided against the right of the Crown.

[ \*219 ]

It remains to consider the effect of the statute upon which so much reliance was placed. That was the statute passed in the reign of Henry VIII. ; and upon the first view of it, considering that statute by itself, and without regard to the state of the law as it previously existed, it might seem that the argument founded upon it was correct. By that statute it is enacted, " That if any

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suit be commenced, or any process be hereafter awarded, for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person or persons, and the King, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons; so always that the King's suit be taken and commenced, or process awarded, for the said debt, at the King's suit, before judgment given for the said other person or persons."

[ \*220 ]

As I have already intimated, if that statute were read without regard to the state of the law as it existed \*at that time, it certainly would furnish an argument against the right of the Crown; but that Act of Parliament, like every other, is to be construed with regard to the state of the law as it previously existed; and so construing that statute, it will be found not to apply to a case like the present.

By the common law, the King had a right of preventing any subject from suing any of his debtors; it was the practice, and it was a right which was sometimes exercised, of granting to those who were his debtors a protection, which prevented any of his subjects from bringing any suit against them. Thus the law stood until an Act of Parliament passed, which I shall draw your Lordships' attention to, namely, the statute of the 25 Edw. III. c. 19. That statute shews what the law was before it was passed, and introduces an alteration in favour of the suitor; and it is in these terms: "Forasmuch as our lord the King hath made before this time protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made satisfaction to our lord the King of that which to him was due by them by reason of his prerogative; and so during such protections no man hath dared to implead such debtors." Your Lordships will observe that the preamble recites the law to be as I have stated it, namely, that the King by his protection was in the practice and had a right to prevent any person from commencing any suit against his debtor; then it goes on to enact, "It is accorded and assented, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's

Court by the debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution \*of the same judgment shall be put in suspense till satisfaction be made to the King of his debt. And if the creditors will undertake for the King's debt, they shall be thereunto received, and moreover shall have execution against their debtors of the debt due to them, and also shall recover against them as much as they shall pay to the King for them." This statute therefore so altered the law as that it enables the subject to bring an action against his debtor, although he be a debtor to the Crown, which before he could not do; but nevertheless it prevents him from taking out execution unless he first satisfies the debt of the Crown. This was the state of the law before the passing of the statute to which I have referred, namely, the statute of 33 Hen. VIII. The subject might commence an action, and might have proceeded even to judgment, but could have no execution without satisfying the King's debt. All, therefore, that the statute of Hen. VIII. does, is to allow a party to have execution without satisfying that debt; it authorizes him to take out his writ, but does not apply to a case in which there are conflicting executions, which is the case in question. If it should be taken literally, that the King should not have execution unless his suit were commenced before a judgment given for the subject, the consequence would be, that the subject might obtain judgment against the King's debtor, and forbear taking out execution for a considerable length of time, and during all that time prevent the Crown from recovering its debt by taking out execution; that would be open to collusion on the part of the subject, and operate to the great prejudice of the King's revenue and his rights. I am therefore of opinion, that the true effect of this statute is to allow the subject to obtain \*judgment, and even to sue out execution, without first making satisfaction to the King; but, nevertheless, to leave the law in all other respects as it stood before; namely, if the King's execution comes while the goods remain the property of the debtor—and, as I have already stated, my opinion is, that they do remain the property of the debtor, although they be taken possession of by the sheriff—the King's execution shall prevail. The contrary of that has been decided in the two cases of *Uppom v. Sumner*, and

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[ \*221 ]

[ \*222 ]

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*Rorke v. Dayrell*; but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your Lordships with referring to these cases; they were very much considered in the Court of Exchequer, and the decision in one of them afterwards became the subject of inquiry in the Court of King's Bench. The case is reported by the name of *Thurston v. Mills*; the point of law, which is the question in the present case, was twice argued before that Court, and a third time upon a question preliminary to the question argued on the two first occasions, and which was really the question in the cause. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched; but I think it may be collected, though not very clearly, that the opinion at least of some of the Judges who sat in the Court at that time, Lord ELLENBOROUGH being at the head of them, and Mr. Justice LE BLANC being one of them, was in favour of the Crown. I cannot assert positively that it was so; but in reading the report of the case, and from my own recollection of the questions introduced into the argument of it, I am strongly inclined \*to think that it was so, and I formed that opinion at the time.

[ \*223 ]

The ground upon which those two decisions of *Uppom v. Sumner*, and *Rorke v. Dayrell*, have proceeded, as to the divesting of the property out of the debtor and vesting it in another, failing, in my opinion, and the argument also that was founded upon the construction of the statute of Hen. VIII., failing, on a due consideration of that statute with regard to the law as it existed before, my opinion is, that the Crown has a right of priority in this case before the subject; and, consequently, that the judgment of the Court of Exchequer must be affirmed. I should further say, that, according to the practice at the time, although the law has since been altered, the judgment of the Court of Exchequer in this case was removed by a writ of error, and argued before the Chief Justices of the King's Bench and of the Common Pleas, of whom I was one, and my Lord WYNFORD the other: we did not come to the same conclusion upon that occasion, and, therefore, we affirmed the judgment, understanding

and meaning that the question, which was one of great importance, should be brought to this House: I have since conferred with my Lord WYNFORD upon the subject, and I have learned from him that he is now perfectly satisfied with the opinion which I have ventured to give to your Lordships, and by which I affirm the judgment of the Court of Exchequer.

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LORD BROUGHAM, L. C. (after reviewing the cases), said:

I certainly entertain a strong opinion that the judgment of the Court of Exchequer in this case is right, and ought, by your Lordships, to be affirmed. I entirely go along with the opinions pronounced by the \*majority of the learned Judges, in answer to the questions put to them. It is of much more importance that this question should be settled, than it is in which way it shall be settled.

[ \*224 ]

*Judgment affirmed.*

#### WRIT OF ERROR FROM THE COURT OF KING'S BENCH.

##### MELLISH v. RICHARDSON (1).

(1 Clark & Fennelly, 224—237; S. C. 6 Bligh (N. S.) 70; 9 Bing. 125.)

This House will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument.

A court of law has authority over its own record, which it may amend, even after error brought.

A court of error will not inquire into the propriety of amendments made in the Court below, but, though such amendments be made after error brought, will consider them as part of the original record subjected to their revision.

THIS was a writ of error brought by the defendant below from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of Common Pleas at Westminster, in favour of the plaintiff below.

The declaration was on a special contract, and contained four special counts and the money counts.

The defendant pleaded the general issue. The cause was tried at the London sittings after Hilary \*Term, 1824, before the Right Hon. Lord Gifford, then Lord Chief Justice of the Court

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June 27.

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[ \*225 ]

(1) Cited in *Scott v. Bennett* (1871) L. R. 5 H. L. 234, 243, 250.

MELLISH of Common Pleas, and a special jury, and a verdict was recorded  
 RICHARDSON. for the plaintiff on all the counts, with 7,500*l.* damages.

Judgment was given for the plaintiff by the Court of Common Pleas upon the whole declaration, after a motion for a new trial or in arrest of judgment, for the damages, and 274*l.* taxed costs.

A writ of error was brought in the Court of King's Bench; special errors were assigned, and the case was argued at the sitting before Michaelmas Term, 1825.

Before the Court of King's Bench gave any judgment, the plaintiff below applied to the late Lord Gifford, then Master of the Rolls, to amend the *postea*, by entering the verdict for the plaintiff on the first count only, but his Lordship declined to interfere, as he doubted whether he had any authority, having ceased to fill the office of Chief Justice, but he certified to the Court, that he should have made the amendment had he possessed the authority to do so. On the 10th of November, 1825, a rule *nisi* was granted by the Court of Common Pleas for amending the *postea*.

On the 24th of November, the rule was made absolute, and the Nisi Prius record was amended accordingly; and on the next day a rule *nisi* was obtained from the Court of Common Pleas for amending the judgment-roll, conformably to the amended *postea*, which rule was made absolute on the 26th of November, and the judgment-roll remaining in the Common Pleas was amended accordingly.

[ \*226 ] While these proceedings were pending in the Common Pleas, namely, on the 25th of November, the Court of King's Bench gave judgment upon the original \*transcript, reversed the judgment of the Court of Common Pleas, and directed a *venire de novo*, intimating an opinion, that the first and second counts of the declaration, which set forth the whole of the agreement between the parties, were good, but that there was not a sufficient consideration to support the third and fourth counts. That reversal was entered of record on the next day.

Upon the amendment being made by the Court of Common Pleas, an application was made to the Court of King's Bench to amend the transcript; and the Court of King's Bench, in the same Michaelmas Term, 1825, amended the transcript in the

same way, and gave judgment for the plaintiff below, affirming the judgment of the Court of Common Pleas, with 106*l.* 10*s.* for the costs in error. MELLISH  
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Upon this judgment the defendant below brought the present writ of error.

Upon counsel being called to the bar, *Mr. Campbell* appeared on behalf of the defendant in error, and stated to their Lordships that there was no counsel present for the plaintiff.

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The agent for the plaintiff said that he had taken every possible means to insure the attendance of counsel, but that he had been unable to do so, on account of their being engaged in very important business elsewhere, and he expressed a hope that their Lordships would allow the case to stand over.

*Mr. Campbell* could not consent to any further delay.

Lord TENTERDEN said, that it had never been the practice of that House to allow causes to stand over on account of the absence of counsel. Other Courts might do so for the convenience of that House, but that House could not do so for their convenience. He remembered an instance in which, when at the bar, \*he had been engaged in a cause in the Court of King's Bench, and on the day appointed for the trial, an appeal, in which he had been retained as counsel, came on to be heard in that House; he mentioned the circumstance to Lord ELLENBOROUGH, who at once allowed him to quit the Court of King's Bench, in order to proceed with the argument before that House. He did not however think it was fit to dismiss this appeal under the circumstances that now appeared, and he should therefore move their Lordships, that the counsel for the defendant in error should proceed with the argument.

[ \*227 ]

The motion was agreed to.

*Mr. Campbell*, for the defendant in error :

The House had no right to look beyond the amended judgment of the Court below, but were bound by the amended roll. If so, then the plaintiff in error must fail, for the unanimous opinion

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of both Courts below had been in favour of the original plaintiff upon the first counts of the declaration. The argument for the plaintiff in error must be, that the Court of Common Pleas had no authority to amend the *postea*, for that the writ of error having removed the record from their Court, their power over it was gone. The Court of Common Pleas had the power to amend the *postea* and judgment, which still remained with them, as they only sent up the transcript of the record to the Court of King's Bench. When they had so amended their own record, and the Court of King's Bench had been informed of the amendment, the latter Court was bound, *ex debito justitiæ* to amend the roll there, and to give judgment for the defendant in error. The amendment of the *postea* was only an amendment of a misprision of the clerk, which was authorized by the 8 Hen. VI. c. 12.

[ \*228 ]

Under that and other similar statutes \*the Courts had long since adopted the practice of amending the *postea* by the Judge's notes. To shew that amendments of a *postea* and a judgment might be made after writ of error brought, he cited *Petrie v. Hannay* (1); *Doe v. Perkins* (2); *De Tastet v. Rucker* (3); *Henley v. The Mayor of Lyme Regis* (4); *Doe v. Dyball* (5); *Friend v. The Duke of Richmond* (6), where HALE, C. B., said it was the constant practice after error from that Court for the record to be amended there, and the same amendment to be afterwards made in the Court of Error: *Wood v. Matthews* (7); *Anonymous* (8); *Anonymous* (9); *Grenville v. Smith* (10); *Ann Healings v. The Mayor and Commonalty of the City of London* (11); *Anonymous* (12); *Meredith v. Davies* (13); *Frankland v. Reeve* (14); *Foster v. Black* (15); *Tully v. Sparkes* (16); *Short v. Coffin* (17); *Rees v. Morgan* (18); *Pickwood v. Wright* (19); *Usher v. Dansey* (20);

- (1) 3 T. R. 659.
- (2) 3 T. R. 749.
- (3) 3 Brod. & B. 65; 6 Moore, 135, and 9 Price, 432.
- (4) 6 Bing. 100.
- (5) 1 Moore & Payne, 330.
- (6) Hardr. 505.
- (7) Poph. 102.
- (8) Sir W. Jones' Rep. 9.
- (9) 2 Roll. Rep. 471.
- (10) Cro. Jac. 627.

- (11) Cro. Car. 574.
- (12) Salk. 49.
- (13) Salk. 269.
- (14) Cas. temp. Hardw. 118.
- (15) Barnes, 7.
- (16) Strange, 869.
- (17) 5 Burr. 2730.
- (18) 3 T. R. 349.
- (19) 1 H. Bl. 643.
- (20) 4 M. & S. 94.

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and *Free v. Burgoyne*, in that House, (mentioned by *Mr. Campbell* as a case in which he had been concerned,) and which was a writ of error from the Court of King's Bench. In that case it did not appear that the party below had asked for costs. The Lord Chancellor (LYNDHURST) said, that the Court below would amend the record, and that House would afterwards amend the transcript accordingly. The counsel, in consequence of that intimation, did not press their objections. *Dunbar v. Hitchcock* (1) was also a decisive authority for the defendant in error. There an amendment was made by the Court of King's Bench after the record had been \*removed to that House, and an amendment too which the Court of Common Pleas, where the case was originally tried, had considered as one of substance, and not a mere misprision of the clerk. Even that Court, however, in at first refusing the amendment (2) had impliedly admitted that if the matter to be amended had been only a misprision of the clerk, they would have made it, though after error brought in the Court of King's Bench. There was no pretence for saying that there was any distinction between the Courts of King's Bench and Common Pleas as to the power they possessed over their own records. It had been said that on error from the Court of King's Bench into the Exchequer Chamber or House of Lords, only the transcript of the record was sent up, but that on error from the Common Pleas into the King's Bench, the original record itself was sent. That was not so in practice, for in all cases of error from any of the superior Courts, the transcript only was sent to the Court of Error. The law too was the same as to both, for the 27 Eliz. c. 8, which gave the writ of error from the King's Bench to the Exchequer Chamber, required that the record itself should be removed. That statute enacted, that the party against whom judgment was given in the King's Bench, might "sue out of the Court of Chancery a special writ of error directed to the Chief Justice, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the Common Bench and Barons of the Exchequer;" and according to the forms given in Tidd's Appendix, c. 44, ss. 10 and 15, the writs of error from the Common Pleas to the King's Bench, and from the latter Court

[ \*229 ]

(1) 3 M. & S. 591.

(2) 5 Taunt. 820.

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to the House of Lords, were in the same words. The King's Bench always \*possessed authority over its own records, and so did the Common Pleas, and the distinction now attempted to be set up was utterly without foundation. If the authority of the cases quoted was not denied, their Lordships had only to look at the first count of the declaration, which was fully proved, and on which the verdict and judgment were now entered, and against which there was no pretence for alleging error.

LORD TENTERDEN :

My Lords, a great doubt has arisen in my mind, how far this House can take notice of the rules and orders of the Courts below. Your Lordships look only to their judgments, and not to any interlocutory matter that may be brought before them. That is the point on which, if it be your Lordships' pleasure, the counsel for the plaintiff in error shall be heard. I entertain great doubts upon it. I have a strong opinion that no consent or agreement of the parties themselves can bind this House, nor can any agreement of the Judges in the Courts below have that effect. It appears that the Court of King's Bench (see the judgment of the Court of King's Bench, delivered by Mr. Justice BAYLEY (1),) have agreed to state the facts on the record, "in order that a court of error may have the opportunity of considering whether the amendment we have required to be made, ought to be made or not." If the Judges of the Court below think proper to do what they conceive will give jurisdiction to this House, they may do it, but that will not alter the real jurisdiction of the House, nor will it alter the nature of the question that arises on the circumstances submitted to your Lordships' consideration. That question seems to me properly to be, whether a court of error can inquire into the propriety of any amendment made by an inferior Court in its own \*record, and to which question I think the attention of counsel ought to be directed.

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The case was allowed to stand over for two days, when it was argued by

*Mr. Barnewall*, for the plaintiff in error :

There are two points in this case, first, whether the Court of

(1) 7 B. & C. 835.

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Common Pleas had the power to amend the *postea*, after the signing of judgment, and also to amend the judgment-roll, by altering the verdict; secondly, whether, if that Court had that power, the Court of King's Bench was bound to make the like alterations. At common law no amendment could be made after final judgment, and entry thereof on the record: *Marriot v. Lister* (1). The power, therefore, to amend the record, after judgment signed, is derived from the Statute of Amendments, 8th Hen. VI. c. 12, and it is confined to the misprision of the clerk of the Court. The question in this case, then, is this, were the errors on this record caused by the misprision of the clerk or by the acts of the parties? It was no misprision of the clerk, but the fault of the plaintiff below, that bad counts were put on the record. It was no misprision of the clerk when he entered the verdict generally, or as he was directed. The errors here, therefore, being caused by the act or omission of the party, from which the misprision of the clerk was distinguished, *Green v. Rennet* (2), was not amendable by the statute of Hen. VI.: *Mason v. Fox* (3). These authorities were perfectly consistent with the cases cited on the other side, for every one of the latter applied to amendments of the record before judgment, or amendments for misprision of the clerk after judgment. The entry of the verdict found by the jury upon all the counts, was no misprision of the \*clerk, but the fault of the plaintiff below, who might have directed it to be entered on the first count only at the time it was given, or moved the Court of Common Pleas to order it to be so entered before judgment. The general rule, as to amending the *postea*, when the jury give general damages, on a declaration consisting of several counts, and one or more of them is defective, is established by the case of *Eddowes v. Hopkins* (4); and by the rules of M. 1654, sect. 21, K. B. and 1654 (5); and, by the particular cases determined according to the above rules, as *Grant v. Astle* (6); *Spencer v. Goter* (7); *Cook v. Cox* (8); *Dunbar v.*

[ \*232 ]

(1) 2 Wilson, 147.

(2) 1 T. R. 782.

(3) Cro. Jac. 631; Vin. Ab. tit. Amendments; and the cases there collected from Bro. Ab.

(4) Doug. 377, 378.

(5) Cp. Barnes, 478; Willes, 443, and 1 T. R. 542.

(6) Doug. 722.

(7) 1 H. Bl. 79.

(8) 15 R. B. 432 (3 M. &amp; S. 110).

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*Hitchcock* (1); *Reece v. Lee* (2). Insufficient pleadings, or any act of the party, or of his counsel, or of the Judge, or Court, are not amendable after judgment: *Blackamore's case* (3); *Mason v. Fox* (4); and *Green v. Miller* (5); in which last case the Court said that they could not amend after judgment, except for misprision of the clerk. If their Lordships should affirm the amendments in this case, every Court in Westminster Hall will be at liberty henceforward to repeal the Statute of Amendments. But it is contended that this House is to look only at the record as it is brought before them in its amended form, and that the appellant is estopped from shewing how it stood originally in the Court of Common Pleas. There was no ground for such an argument: the amendments were made without the consent of the plaintiff in error, and therefore there was no estoppel, which is where a person is concluded by his own act or acceptance (6). The truth appeared by this record to be, that these amendments of the *postea* and judgment-roll were made by the Court of Common Pleas, not only \*after final judgment was entered up, but also after the record of the judgment had been removed by writ of error to the Court of King's Bench, and while the same remained in that Court. By the statute 8 Hen. VI. c. 1, amendments are to be made by the Judges of the Courts in which the record is, by way of error or otherwise, according to their discretion. The Judges of the Court of Error were bound to exercise their judgment, whether the error sought to be amended arose from the misprision of the clerk. There was a distinction between proceedings on writs of error in these Courts: when a writ of error was brought in the King's Bench, on a judgment in the Common Pleas, the record itself, and not merely a transcript of it, was removed into the former Court, except in the case of a fine (7); the case of *Andrews v. Lord Cromwell* (8); *The Dean of Carlisle's case* (9); and

- (1) 5 Taunt. 820; 1 Marsh. 382.  
 (2) 7 Moore, 269.  
 (3) 8 Co. Rep. 310.  
 (4) Cro. Jac. 631.  
 (5) 2 B. & Ad. 781.  
 (6) Co. Litt. 352 a, Com. Dig. tit. Estoppel.  
 (7) Year Books, 40 Ass. 29, 22

- Edw. III., 6 pl. 24; Fitz. Nat. Brev. tit. Writ of Error, 20 F.; 1 Rol. Abr. tit. Error, 752, 753; 3 D'Anv. Abr. tit. Error, P. a; Vin. Abr. tit. Error, P.; Bac. Abr. tit. Error, B. 2, and Com. Dig. tit. Pleader, 3, B. 13.  
 (8) Cro. Eliz. 891.  
 (9) Godb. 375.

*Coot v. Linch* (1). The record, therefore, according to those authorities, could not be in the Court of Common Pleas, where the amendments were made. The judgment which had been entered upon that record was reversed by the Court of King's Bench, and that reversal was entered of record in that Court before the judgment-roll was amended in the Court of Common Pleas, which amendment was not made until after a lapse of several Terms, contrary to the case of *Harrison v. King* (2). It appears by the record, that two different and inconsistent judgments were given by the Court of King's Bench, one by which the judgment of the Court of Common Pleas was ordered to be reversed, the other by which it was affirmed, and the latter was given after \*the first was entered up; all which was contrary to the authorities before referred to. The Court of King's Bench was not bound to follow the amendments made by the Court of Common Pleas, and the judgment of the former Court, reversing that of the latter, ought to be affirmed.

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#### LORD TENTERDEN :

This case appears to me to resolve itself into this question, whether it is competent for a court of error to examine the propriety of an amendment of the record of the Court below, on the order for the amendment being sent up as part of the record? If the Judges shall be of opinion that it is not competent for a court of error so to do, the judgment of the Court below must be affirmed without further discussion, but, if they doubt upon that point, then they will consider, whether, supposing it to be competent for a court of error to inquire into these amendments, that which has been made in the Court of Common Pleas in this case is right.

The LORD CHANCELLOR put these questions in form to the Judges. The House then adjourned for some time, during which their Lordships went up to present an address to the King on his escape from the attack made on his Majesty at Ascot Heath. On the return of their Lordships,

(1) 1 Lord Ray. 427; Cowp. 843.

(2) 1 B. & Ald. 161 : see the report in the Ex. Ch. 18 R. R. 524.

MELLISH     Lord TENTERDEN, in the absence of the Lord Chancellor, sat as  
                  <sup>v.</sup>  
RICHARDSON. Deputy Speaker.

BAYLEY, B., delivered the following judgment :

[ \*235 ]     In the absence of my Lord Chief Justice TINDAL, it devolves on me to give the answer of the Judges to your Lordships' questions, which are these : First, whether it is competent to a court of error to examine the propriety of an amendment of the record made by the Court below, being a court of record, the order for the amendment being sent up as part of the record ? Secondly, whether, supposing it to be \*competent, an amendment made by the court of record in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish v. Richardson*, would be lawfully made ?

Upon the first of these questions, his Majesty's Judges are of opinion, that it is not competent to a court of error to examine the propriety of an amendment of the record made by the Court below, being a court of record, although the order for the amendment is sent up as part of the record. The proper object of a writ of error is to remove the final judgment of the Court below, for the revision of the superior Court, in order that such Court, from the premises contained in the record of the inferior Court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the Court below. These premises are, the pleadings between the parties ; the proper continuances of the suit and process ; the finding of the jury upon an issue in fact, if any such has been joined ; and, lastly, the judgment of the inferior Court. All these premises, from which such judgment has been derived, the parties to the suit below have the right, *ex debito justitiæ*, to have upon the record.

But the orders or rules for amendments of proceedings made by a Court in the progress of a suit therein depending, do not fall within the description of any part of the record ; but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the courts of law possess, either by the common law, or by the

statutes of amendments which have been from time to time enacted by the Legislature for that purpose.

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The practice of the Courts below is a matter which \*belongs by law to the exclusive discretion of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to, or revision by, a superior Court. And we cannot but observe, that no precedent has been cited at the Bar in which an entry similar to that contended for by the plaintiff in error is to be found. So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion, in point of law, of the Judge who tried the cause, should be made the subject of revision by a superior Court, the Statute of Westminster the Second (13 Edw. I.) expressly gave authority for that purpose by a bill of exceptions.

We think, therefore, that it is not competent for the superior Court to examine into the propriety of the amendment, which is left to the sole discretion of the Court by which it has been made. And, if this be so, then the circumstances for the orders for the amendment being put upon the record in this instance, cannot have the effect of giving competency to the superior Court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by the writ of error, and if the parties to the suit have not, *ex debito justitiæ*, the right to put the rules and orders for the amendments upon record, then the superior Court would have, or would not have, authority to inquire into the propriety of the amendments, according as the inferior Courts did or did not return, in the particular instance, the order by which the amendment is made.

One of his Majesty's Judges has felt some doubt and difficulty in acceding to this opinion; but, upon the whole, acquiesces in its propriety.

Such being the opinion of the Judges on the first question submitted to them by your Lordships, it becomes unnecessary for them to offer any upon the second.

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MELLISH LORD TENTERDEN :

<sup>E.</sup>  
RICHARDSON.

June 27.

My Lords, agreeing, as I do, with the opinion that has just been delivered, it is not necessary for me to trouble your Lordships at any length. It may be some satisfaction for your Lordships to know, that the LORD CHANCELLOR is of the opinion you have just heard, and so is the noble and learned lord, the CHIEF BARON, who has read the case, and so is the noble and learned Earl (ELDON), who was present when the case was first argued. If the House could entertain an inquiry into the propriety of amendments made in courts of record, any other Court sitting as a court of error might do so ; yet this is the first instance in which any attempt has been made to place on the record, for the sake of the revision of a court of error, any thing more than the pleadings and judgment of the Court below. If a court of error could have the right to inquire into the propriety of any interlineations made in the judgment of a Court below, we should, before this time, have had some instances of that sort. But, as I have before observed, there are none. And if once the precedent is introduced of inquiring into the propriety of interlocutory matters, I am afraid that courts of error will grant no writs of error that may not be made the means of delaying the interests of justice, and putting the parties to needless expense. It is with great satisfaction that I have heard the opinions of his Majesty's Judges on this occasion, and that I now move your Lordships to affirm the judgment of the Court below. Another question might arise on the subject of costs, but as the Court of King's Bench has put the question on the record, I shall submit that this judgment be affirmed without costs.

*Judgment affirmed accordingly.*

## APPEAL FROM THE COURT OF CHANCERY.

## DILLON v. PARKER.

(1 Clark &amp; Finnely, 303—318; S. C. 7 Bligh (N. S.) 325.)

In order to raise a case of election on a testamentary instrument, the intention of the testator must clearly impose an obligation to elect; and in order to hold a party to have made election, his acts must be conformable to the instrument imposing the obligation to elect, and not adverse thereto.

Where parties may elect between two titles, either as tenants for life or tenants in fee-simple, and continue in possession for near forty-four years, executing in the mean time various deeds, reciting that they took under the former title: Held, that they have elected to take under that title, and their heir-at-law is precluded from claiming the fee under the latter.

[This was an appeal in which a decision of Lord ELDON, L. C., affirming a previous decision of PLUMER, M. R., was itself affirmed by the House of Lords. The case is reported below, 18 R. R. 72, and a note of the subsequent appeal to the Lord Chancellor, and of this appeal to the House of Lords, will be found in 18 R. R. at p. 86.]

Upon the present appeal, Lord LYNTHURST doubted whether the son's will raised a case of election against the father, but he agreed with the view adopted below by Lord ELDON, that the daughters intended to take under the will of their father and not under the will of their brother, and he added that as the persons under whom the plaintiff claimed might have called upon the father to make his election in 1769, but had allowed the question to lie dormant for 40 years, the claim was barred by lapse of time.—O. A. S.]

*The judgment was affirmed without costs.*

## APPEAL FROM THE COURT OF CHANCERY.

## THE KING OF SPAIN v. HULLET AND WIDDER (1).

(1 Clark &amp; Finnely, 333—354; S. C. 7 Bligh (N. S.) 359.)

A foreign sovereign prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by the defendants to his original bill: Held, that he

(1) *United States of America v. Wagner* (1867) L. R. 2 Ch. 582, 35 L. J. Ch. 624.

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Aug. 15, 16,  
19.  
—  
Lord  
LYNTHURST.  
[ 303 ]

1833.  
Aug. 19, 20.  
—  
Lord  
BROUGHAM,  
L. C.  
Lord  
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stands on the same footing with ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally and upon oath.

The plaintiffs in the cross-bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month's time to plead, answer or demur to the amended bill after the plaintiff therein should have answered their cross-bill, that order is held good, and is accordingly affirmed.

THE material allegations and prayer of the appellant's original bill are stated in the [former report of this case, in which the appellant established his] right to sue in our courts of equity as a foreign sovereign, and in his political capacity (1). The respondents, on the 3rd of July, 1828, filed their cross-bill in the Court of Chancery against the appellant, and Don Justo de Machado, who had also been made defendant to the appellant's bill, but remained out of the jurisdiction.

[ 334 ] [The cross-bill stated] that the appellant had in his power, and in the power of his agents, servants and ministers, various documents and statements, by which, if produced, it would appear that many of the allegations in said bill were not according to the truth, and by which also the truth of many other circumstances would appear, whereby it would be shewn that appellant had no title to relief against these respondents in respect of any of the matters in said bill mentioned: that the appellant had no right to the fund provided by the treaties in the said original bill mentioned; and that the claims of Spanish subjects on that fund had been adjudicated in Paris, and openly, and with the knowledge of the appellant, sold, and by such sales became the property of French and British subjects: that his Catholic Majesty had unduly got possession of a considerable portion of the trust or indemnity fund, and misapplied it, and that he intended to apply to the general purposes of his government the money alleged in his bill to be deposited with the respondents. \* \* \*

[ 336 ] The cross-bill prayed, amongst other things, that the appellant might be ordered to make to these respondents the discovery thereby sought, and that his said Catholic Majesty might also be restrained from proceeding in the said original suit until he

(1) See 28 R. R. 56.

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[ \*337 ]

should \*have granted a full discovery of all the matters of which a discovery was thereby prayed, and of all the writings, papers and documents therein mentioned.

The respondents, in the same month of July, 1828, put in their joint and several answer to the appellant's original bill. And the appellant having amended his bill in March, 1830, an order was made in both causes by the VICE-CHANCELLOR, bearing date the 8th day of May, 1830, upon the application of the respondents, that they should have a month's time to plead, answer, or demur to the amended bill, after the appellant should have answered the bill of the respondents. An application, made on behalf of the appellant to the then Lord Chancellor to discharge that order, was refused on the 6th day of July following. \* \* \*

The King of Spain now, by his appeal to this House, prayed for the reversal of these orders. \* \* \*

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The *Attorney-General* and *Sir C. Wetherell*, in support of the appeal :

This is a case of first impression. This is the first time a foreign potentate has been called upon as a defendant to put in an answer upon oath. \* \* \*

A peer can, and does take an oath in some cases, but the Court of Chancery dispenses with his oath in an answer to a cross-bill. Why cannot this House institute a like rule in the case of a King ? In cross-bills against corporations, the town clerk swears to the answer for them. \* \* \*

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It is impossible, after examining the history and circumstances of this case, and the position in which the respondents are placed, to contend that an answer \*from the King of Spain, upon oath, to the respondents' bill, is in any degree whatsoever necessary, in order to give them the means and opportunity of defence.

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[ \*346 ]

LORD CHANCELLOR :

You are not to assume that the King of Spain has no knowledge of the matters, of which a discovery is sought by the bill ; suppose he has something in *græmio*, which no one else can disclose.

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*Counsel for the appellant :*

Our impression is, that he cannot take an oath; the law of nations will not allow the independence of a sovereign to be lost by taking such oath. The appellant is ready to comply with all the forms of an answer, except the oath. Being allowed to file a bill as a sovereign prince, and in a public character, as trustee for his subjects, he ought not, and cannot now sink the sovereign in the individual, and put in an answer on oath to what the respondents call a cross-bill. There is no instance of a foreign sovereign being made a defendant to a cross-bill, and therefore the Court of Chancery or this House is free to lay down the rule for the first time, being quite unfettered by practice, by law, or by Act of Parliament. A corporation supplies an officer who can put in an answer upon oath; the appellant is ready to do the same. He tenders M. Escudero, or any other officer, on his behalf that the Court of Chancery pleases to call for. The King of Spain is a foreign corporation, and offers an individual who is within the jurisdiction, who is competent to give all the requisite information, and who can be dealt with in every way as liable to all the consequences. He states by his affidavit that he has more knowledge of these matters than the appellant can have.

[ 347 ]            *Sir Edward Sugden and Mr. James Russell*, for the respondents :

[ 349 ]            \* \* The chief question here is, whether the King of Spain can take an oath? What prevents him? Because the King of England cannot take an oath to matters in our Courts, so, it is argued, cannot the King of Spain. But he is to take an oath, if he puts himself into that state in which an oath is required. The counsel for the appellant say, that the law of nations forbids it, and they offer a representative for his Majesty, to swear to the answer. But our Courts require the oath of the individual who answers. \* \* The King of Spain is bound by the same rule that binds others; there is no distinction between suitors. If he came here for justice, what is there to entitle him to an exemption from the rules of justice? \* \* There is nothing more inconsistent with royal rank than to be sued at all; but if a King be sued, he must act like any other individual. The law

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is so laid down in *Calvin's* case, before referred to. *The Columbian Government v. Rothschild* (1) is a decision quite in point, and that decision was sanctioned by Lords ELDON and REDESDALE. \* \* \*

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*The Attorney-General:*

[ 352 ]

The rules of the Court of Chancery are of its own creation, and the question is, whether in this case of novelty and difficulty it may not dispense with an oath. It is a moral impossibility that the King of Spain can answer on oath before a commissioner from our Court of Chancery, in the face of his subjects; that would be stripping himself of his sovereignty, as it would be acknowledging a superior. It would be also unreasonable, as your Lordships allowed him to sue as a foreign prince. \* \* \*

LORD PLUNKETT:

[ 353 ]

My Lords, it is not my intention to go into the reasons upon which I found my opinion that the orders appealed from in this case ought to be affirmed; that I will leave to my noble and learned friend, with whom I agree, and who will state the grounds of his opinion. I now move that the orders appealed from be affirmed.

THE LORD CHANCELLOR:

My Lords, I do not see any occasion for postponing the consideration of the judgment to which I think your Lordships ought to come in this case. The more I see of it, the more I am inclined to affirm the orders of the Courts below. I took occasion, during the argument at the Bar, to throw out my opinion, that though the King of Spain sues here as a sovereign prince, and is justly allowed so to sue, yet, beyond that, he brings with him no privileges that can displace the practice as applying to other suitors in our Courts. The practice of the Court is part of the law of the Court; if any instance could be adduced in which the Court deviated from the general practice, or by which the Court was divested of the power of applying the universal rule, I should concede to that, and it would assist me in \*giving the plaintiff relief. Your Lordships' decision upon

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the demurrer did not dispose of this point; but it is clear to my mind, that if the present question had been then mooted before your Lordships, it would have been disposed of in the same way. One of the grounds of Lord LYNDHURST's decision is, that the appellant should be on the same footing with his adversary, subject to the control of the Court, and liable to the rules of practice. It was impossible to read the judgment in the case of *The Columbian Government* against *Rothschild*, without seeing that the present MASTER OF THE ROLLS, in giving that judgment, proceeded on the same view of the matter. The noble and learned Lord who assisted yesterday at the argument, authorized me to say that he concurred in the decision of the Court below. The reluctance which the Court below had in coming to that decision was, that there was an appearance of an advantage being taken by one party. But it would be improper to state that in this stage of the proceedings. I concur in the proposition of my noble and learned friend.

The question was then put, and the orders of the Courts below

*Affirmed with costs.*

#### APPEAL FROM THE COURT OF CHANCERY.

#### CADELL v. PALMER.

(1 Clark & Fennelly, 372—423; S. C. 7 Bligh (N. S.) 202.)

A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of 21 years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of 21 years be added the number of months equal to the longest or ordinary period of gestation.

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of 20 years from the decease of the survivor of 28 persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

[THIS was an appeal from a decision of LEACH, V.-C. (reported in 1 Simons, 267, under the title of *Bengough v. Edridge*), and

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Feb. 15.

1833.

May 20.

June 25.

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BAYLEY, B.

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is a leading case upon the rule against perpetuities. The opinion of the Judges and the decision of the LORD CHANCELLOR have exclusive reference to certain questions which were framed for the purpose of effectually disposing of the points which arose, and under the circumstances it appears no longer necessary to set out the limitations of the will under which these questions arose, or to notice the arguments of counsel upon points which are no longer open to argument.—O. A. S.]

*Sir Edward Sugden* and *Mr. Lynch* appeared for the appellant.

*Mr. Preston* and *Mr. Wilbraham* for the respondents.

The learned Judges who attended, were Justices A. Park, Littledale, Gaselee, Bosanquet, Alderson, J. Parke and Taunton, Barons Bayley, Vaughan, Bolland and Gurney; and the following were the questions submitted to them:

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First, whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of 21 years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

Thirdly, whether a limitation, by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in

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gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

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The learned Judges attended again on a subsequent day, and Mr. Baron BAYLEY delivered their opinion as follows; first, in answer to the first question:

[ \*412 ]

I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' \*bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carew* (1), in the year 1696, and *Marks v. Marks* (2), in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a third person an option, after the death of a particular tenant, to purchase the estate; and 12 months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of 21 years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor v. Biddal* (3), 1677, is the first instance we have met with in the books, in which so great an excess as 21 years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of 21; there might be an interval, therefore, of 21 years between the death of Robert, till which time no one could be heir of his \*body, and the period when such heir should

[ \*413 ]

(1) 1 Show. Parl. Cas. 137.

(2) 10 Mod. 419.

(3) 2 Mod. 289.

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attain 21, till which time the estate was not to vest: and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens* (1). That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of 21 years, his heirs and assigns for ever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddal*, and says "that however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and, considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for 21 years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. \*These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for 21 years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of 21 years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood* (2), Lord Chief Justice WILLES discusses shortly

[ \*414 ]

(1) *Cas. temp. Talb.* 232.(2) *Willes*, 213.

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the doctrine of executory devises, and notices their progress of late years. He says, "the doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz. to a child *en ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to 21 years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson v. Woodford* (1), Lord Chief Baron MACDONALD prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice WILLES, with his usual accuracy and \*perspicuity." He does, indeed, afterwards say (2), after noticing *Long v. Blackall* (3), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of WILLES, Ch. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of 21 years after the death of a person *in esse*, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman v. Goodright* (4), is this passage, "Lord Chief Justice MANSFIELD, says, 'it is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and 21 years after,' which is the line now drawn, and very sensibly and rightly

(1) 1 Bos. & P. (N. R.) at p. 388.

(2) *Ibid.* 393.

(3) 4 R. R. 73 (7 T. R. 100).

(4) 2 Burr. 879.

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drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice MANSFIELD or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth v. Thirkell* (1), Lord MANSFIELD says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and 21 years afterwards." In *Jee v. Audley* (2), Lord KENYON (Master of the Rolls), says, "The limitations of personal \*estate are void, unless they necessarily vest, if at all, within a life or lives in being, and 21 years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the *Duke of Norfolk's* case (3), to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long v. Blackall* (4), the same learned Judge says, "The rules respecting executory devises, have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person, to whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the Courts have said, so far we will allow executory devises to be good." And, after referring to the *Duke of Norfolk's* case, he concludes, "It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and 21 years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson v. South* (5), Lord KENYON says, "The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, must) take place after a life or lives in being, and within 21 years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not

[ \*416 ]

(1) 3 Bos. &amp; P. 652, n., 654, n.; S. C.

10 Moore, 238, n.

(2) 1 R. R. 46 (1 Cox, 324).

(3) 3 Chan. Ca. 1.

(4) 7 T. R. 100, 102.

(5) 7 T. R. 555, 558.

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expressions in other cases about the same period, from which it might clearly be collected, that \*minority was originally the foundation of the limit, and to raise some presumption that the limit of 21 years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and 21 years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule, as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of 21 years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (1), puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for Courts of Justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and 21 years afterwards; as, when lands are devised to such unborn son of a *feme covert* as shall first attain 21, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way; "An executory devise, to vest within a short time after the period of a life in being, is good;" as \*in *Lloyd v. Carew*, which he states, and *Marks v. Marks*; and he says, "The Courts, indeed, have gone so far as to admit of executory devises, limited to vest within 21 years after the period of a life in being;" as in *Stephens v. Stephens*, *Taylor v. Biddal*, *Sabbarton v. Sabbarton* (2), all of which he states, and in all of

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(1) 2 Blackstone's Commentaries, (2) Cas. temp. Talb. 55, 245.  
 174, 16th edition.

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which the vesting was postponed on account of minority only ; and then he draws this conclusion, " That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within 21 years after the period of a life in being, is good ; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested, that it was in cases of minority only that the 21 years were allowed ; but, by stating it generally, as he did, he must have considered 21 years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne's understanding, may be collected from many other passages in his book ; but from none more distinctly than in the third division of his first chapter on executory devises (1), where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus : " And the case of a limitation to one for life, and, from and after the expiration of one day, (or any other supposed period, not exceeding 21 years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the \*second branch of the general distribution of executory devises." And in his third chapter (2), he begins his eighth division with this position ; " It is the same, (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of 21 years after the period of a life in being." And in the eighth division of the fourth chapter (3), he says, " It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within 21 years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearne is continued in

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(1) 9th edition, 399, 401.

(3) P. 517.

(2) P. 470.

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the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson v. Woodford* (1), shewing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule: but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of 21 years was correct. At length, in *Beard v. Westcott* (2), the question, whether an executory devise was good, though it was

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\*not to take effect till the end of an absolute term of 21 years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. GRANT, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812; the next in November, 1813; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord ELDON to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations

(1) 4 Ves. 337.

(2) 24 R. R. 553 (5 Taunt. 393).

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also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point \*than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by Lord Chief Justice WILLES, Lord MANSFIELD and Lord KENYON, and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that the limit is a life or lives in being, and 21 years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for 21 years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

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Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. They consider 21 years as the limit, and the period of gestation \*to be allowed in those cases only in which the gestation exists.

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THE LORD CHANCELLOR :

I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties ; but whatever was its beginning, it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew* (1), settled the rule ; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. Fearne's book, without seeing that it was the settled opinion of that eminent person, that 21 years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice BULLER's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearne had done. The opinion of Lord MANSFIELD was the same, and the doctrine is not weakened by what Lord KENYON is stated to have said in *Long v. Blackall* (2). In the opinion of all, the rule was clearly confined to 21 years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, \*to which the learned Judges also applied themselves, and they have excluded the period of gestation beyond the term of 21 years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the Court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if the vesting be suspended for 21 years beyond a life or lives in being ; but that beyond that period it would.

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*The judgment of the Court below was affirmed.*

(1) 1 Show. P. Cases, 137.

(2) 7 T. R. 100.

LUCAS *v.* NOCKELLS.

(1 Clark &amp; Finnelly, 438—494; S. C. 7 Bligh (N. S.) 140; 10 Bing. 157.)

[REPORTED with the report, in 4 Bingham, of the proceedings in the Exchequer Chamber, 29 R. R. 721.]

1833.  
June 25.  
—F. H. RENNELL, ADMINISTRATRIX OF THOMAS RENNELL, CLERK, *v.* THE BISHOP OF LINCOLN AND OTHERS (1).

(7 Barn. &amp; Cress. 113—203; S. C. 9 Dowl. &amp; Ry. 810.)

MIREHOUSE *v.* RENNELL (IN HOUSE OF LORDS).

(1 Clark &amp; Finnelly, 527—610; S. C. 8 Bing. 490; 7 Bligh (N. S.) 241; 1 Moore &amp; Scott, 683.)

Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. *Per* BAYLEY, HOLROYD, and LITTLEDALE, JJ. Lord TENTERDEN, Ch. J. *diss.* Affirmed in H. L. according to the opinions of six Judges out of eight.

*QUARE IMPEDIT.* The declaration stated, that whereas one William Dodwell, clerk, doctor in divinity, late prebendary of the prebend or canonry of South Grantham, founded in the cathedral church of Salisbury, heretofore, to wit, on, &c. at, &c. was seised of and in the said prebend or canonry, with its appurtenances, to which said prebend or canonry the advowson of the rectory of the parish church of Welby with its appurtenances then belonged and still belongs, in his demesne as of fee, in right of the said prebend or canonry. And so being such prebendary as aforesaid, and so being seised of and in the said prebend or canonry, with its appurtenances, to which, &c. afterwards, to wit, on, &c. at, &c. presented to the said church of Welby, being then vacant, one William Dodwell, master of arts, his clerk, who, on the said presentation of the said W. D., doctor in divinity, was admitted, instituted, and inducted into the same in the time of peace, &c. That the said W. D., being so seised of the prebend or canonry, with its appurtenances, to which, &c. in his demesne

(1) Cited by BOVILL, Ch. J. in *Ford* COURT in *Walsh v. Bishop of Lincoln v. Harington* (1869) L. R. 5 C. P. (1875) L. R. 10 C. P. 518, 533.—282, 287, and in the judgment of the R. C.

1827.  
July 3.  
LITTLEDALE,  
J.  
HOLBOYD, J.  
BAYLEY, J.  
Lord  
TENTERDEN,  
Ch. J.  
1833.  
May 25.  
BOSANQUET,  
J.  
J. PARKE, J.  
GASELEE, J.  
PARK, J.  
BAYLEY, B.  
BOLLAND, B.  
LITTLEDALE,  
J.  
TINDAL,  
Ch. J.  
Lord  
LYNDHURST.  
Lord  
WYNFORD.  
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as of fee in right of the said prebend or canonry, afterwards, to wit, on, &c. at, &c. died so seised; after whose death, to wit, on, &c. at, &c. one Robert Price, clerk, was lawfully admitted, &c. and afterwards died; after whose death, to wit, on, &c. at, &c. Thomas Rennell, the intestate, was lawfully admitted, [ \*114 ] \*instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which, &c. whereby the said Thomas Rennell then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry. And the said Thomas Rennell being so seised, the said church, afterwards, to wit, on, &c. at, &c. became vacant by the death of the said Rev. William Dodwell, clerk, the late parson and incumbent thereof, and still is vacant, whereby it then and there belonged to the said Thomas Rennell to present a fit person to the said rectory of the said parish church so vacant as aforesaid. Averment, that afterwards, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. the said Thomas Rennell died intestate, so seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, without having presented any person to the said rectory of the said parish church; after whose death, and whilst the said church was so vacant as aforesaid, to wit, on, &c. at, &c. administration was granted to the plaintiff, whereupon and whereby it then and there belonged, and now belongs to the said F. H., as administratrix as aforesaid, to present a fit person to the said rectory of the said parish church so being vacant as aforesaid, and which is still vacant, but the said Bishop of Lincoln and the said T. H. Mirehouse and W. S. Mirehouse unjustly hinder her, &c. The Bishop of Lincoln, by his plea, disclaimed except as to the admission, institution, and induction of the rectors to the same rectory and parish church, and all such other things as belong to [ \*115 ] \*the ordinary as ordinary of that place. The said defendants, T. H. Mirehouse, clerk, and W. S. Mirehouse, clerk, pleaded that after the said T. Rennell had so died without having presented any person to the said rectory of the said parish church, and whilst the said church was so vacant as aforesaid, to wit, on,

&c. at, &c. he, the said defendant, T. H. Mirehouse, clerk, was lawfully admitted, instituted, and inducted prebendary of the said prebend or canonry, with its appurtenances, to which said prebend or canonry the said advowson with its appurtenances then belonged and still belongs, whereby he the said T. H. Mirehouse then and there became and was seised of and in the said prebend or canonry, with its appurtenances, to which, &c. in his demesne as of fee in right of the said prebend or canonry, and whereby it then and there belonged to him to present a fit person to the said rectory so being vacant as aforesaid, and that the said T. H. Mirehouse presented the said defendant W. S. Mirehouse. Upon the Bishop's disclaimer, the plaintiff prayed judgment against him, and demurred to the plea of the other defendants. Joinder in demurrer. The case was argued in C. P., and judgment given for the defendants, whereupon the plaintiff brought a writ of error. The case was argued in Michaelmas Term, 7 Geo. IV., by

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*Patteson*, for the plaintiff in error. \* \* \*

*D'Oyley*, Serjt. *contrà*. \* \* \*

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*Patteson*, in reply. \* \* \*

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*Cur. adv. vult.*

The learned Judges not being agreed in opinion, now delivered judgment *seriatim*.

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LITTLEDALE, J. :

The question raised upon the defendants' plea, to which there is a demurrer, is, if there be a \*prebendary of a prebend to which the advowson of a church is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the successor of the prebendary is entitled to present? But that point need not be decided, because, though if the affirmative of that be true, it would be an answer to the plaintiff's declaration, yet supposing it not to be true, the defendants have a right to shew, that, even though the right be not in the successor, yet it is not in the plaintiff.

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And, therefore, the point comes more properly to be considered on the plaintiff's declaration, and upon that the question is, "if there be a prebendary of a prebend to which an advowson is appendant, and the church becomes void in the lifetime of the prebendary, and he dies without presenting to the church, whether the executor or administrator (as the case may be) of the deceased prebendary be entitled to present?" For if not, it is quite immaterial to the plaintiff's claim whether the right be in the successor, or in the King, or in the Bishop of the diocese in which the prebend is, or in the Bishop of the diocese in which the rectory is. I may, however, say that though the question is upon the plaintiff's right, yet the dispute is in effect between the plaintiff and the successor to the prebend; because there does not appear to be any ground for the claim of the Crown, except that if no one can establish a legal right, the presentation would belong to the King as the head of the Church. There seems no ground for the claim either of the Bishop of Lincoln or Salisbury as there is no lapse, no such right is set up, and it is not necessary to enter into any discussion to shew that such right could not be supported. It is admitted on both sides that this is the \*first case in which the question comes to be decided in a court of justice; and it must be considered in what way presentative benefices have been treated in the decisions which have taken place in cases which have any resemblance to the present, and in the opinions of text writers of authority. There is no doubt that in case of a benefice presentable for institution, if a person in his own right, as contradistinguished from his corporate rights, be seised in fee or in tail of an advowson appendant to a manor or other estate, or of an advowson in gross, and the church becomes void in the lifetime of the patron, and the patron dies, the church still being void, the executor shall present, and not the heir: Brooke's Abr. tit. Presentation al Eglise, 34; Fitzherbert, Presentment à l'Eglises, 7; Fitzherbert's N. B. 33, 34; Co. Litt. 388a; the *Queen, Fane*, and the *Archbishop of Canterbury's* case (1); Comyns' Digest, Eglise, H 2, where he mentions it as of his own authority; admitted in the case of *Repington v. The Governors of Tamworth School* (2);

(1) 4 Leon. 109.

(2) 2 Wils. 150.

recognized in the case of *Holt v. Bishop of Winchester* (1), where the case was, that if a man seised in fee of an advowson be parson of the church, and dies, his heir, and not his executor, shall present; for though the advowson doth not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said to be severed from the advowson before it descend to the heir, and vest in the executor, yet both the avoidance and the descent to the heir happening at the same instant, the title of the heir shall be preferred as the elder. But that recognizes the general proposition, \*though in the particular case the title of the heir is to be preferred. How the presentation came to belong to the executor, and whether it would not have been as well if it had been held to belong to the heir, it is now too late to enquire; the law has been so long settled, and has been so repeatedly admitted, that it would be most dangerous to think of disturbing it. The reason assigned in *Fitz. N. B. 33*, for its going to the executor is that it is a chattel vested and severed from the manor, and in 4 Leon. 109, it is called a chattel. In *Wentworth's Office of Executors*, 54, it is said that the next presentation before it becomes void is a chattel real, and after, it is a personal chattel. The language of six Judges in *Stephens v. Wall* (2), (where the question was, whether the present avoidance of a church could be granted by a subject) is, that the grant of the present avoidance was void "because it was a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority; and also a chose in action, and in effect, the fruit and execution of the advowson, and not any advowson, and yet executors shall have it by privity of law." The principal case was, whether the present avoidance of a church could be granted by a subject, and six of the Judges to whom the above expressions are attributed, held that it could not; but though the other three Judges differed, I do not understand that to be as to what is there said by six of the Judges, but only as to the point itself in discussion. However the law has since been recognized according to the decision in *Dyer* as to the principal case: *Co. Litt. 120 a*, 3 *Burr. 1515*. The case

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(1) 3 *Lev. 47*.

(2) *Dyer*, 282.

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itself is recognized in *\*Brokesby v. Wickham* and the *Bishop of London* (1). There are other cases also besides these of executors or tenants in fee or in tail where the void turn is treated as a chattel. If a woman be seised of an advowson and marries, and she and her husband have issue, though the right of patronage descends to his heir, and though the wife never presented, and died before the church became vacant, the right of presenting is vested in the husband during his life, as tenant by the curtesy, though his wife had but a seisin in law, because he could by no industry obtain any other seisin. And if the church in this case becomes void during the life of the husband, and he dies during the vacancy, the heir shall not present, but the husband's executor; and if, the church being void, the wife dies not having had issue, so that the husband is not tenant by the curtesy, yet he shall present to the void turn as being a chattel: Co. Litt. 29 a, 120 a, 388 a; Bro. Present. al Esglise, 18—22; Watson, Incumbent, c. 9. And in Fitz. N. B. 34, "If a vicarage happen void, and before the parson present he is made a bishop, &c., yet he shall present to this turn, because it is a chattel vested in him." This last position of Fitzherbert shews that in his opinion it was as much a chattel in case of an ecclesiastic as in any other case.

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The plaintiff therefore contends, that as this is a chattel vested in her, in her quality of administratrix, the right to present is in her. But though the law be not doubted by the defendant, to the extent of the cases to which it has been carried, yet he says that it is not founded on principle, and should not be carried beyond the cases already decided. And he says the presentation \*ought not to go to the executor, because it is not assets; and for this may be cited Co. Litt. 388 a, "Nothing can be taken for a presentation, and therefore it is not assets;" Co. Litt. 120 a, "It is not merely a chose in action;" Fitz. N. B. 33, "And if there be guardian in socage of a manor to which an advowson is appendant, and the church becomes void, the heir shall present and not the guardian, because he cannot account for the same." So Co. Litt. 17 b, guardian in socage shall not present to an advowson, because he can take nothing for it, and cannot

(1) 1 Leon. 17.

account for it, and he shall not meddle with any thing he cannot account for; S. P. in Co. Litt. 89 a; and there the reason given that he can make no benefit of it is, that the law doth abhor simony; and the same reason is given in *The Bishop of Lincoln v. Wolforstan* (1). But as to this point the cases of guardians do not apply, because their duty is to account for what they make, and, of course, they cannot meddle with what they cannot turn into profit. But it is otherwise in the case of an executor. An advowson is assets in the hands of the heir, and the right of the next presentation to a church which is full, is assets in the hands of an executor; both these are allowed by the law to be sold, but a void presentation is not. The meaning of assets is, that it may be converted into money, which a void presentation cannot be; but the reason of that is, not that it is a chose in action, but because the law against simony prevents its being sold, which otherwise it might be. In 3 Burr. 1515, Lord MANSFIELD and Mr. Justice WILMOT say, that the true reason why a grant of a fallen presentation is not good, is the public utility, and the better to guard against simony; not for the fictitious \*reason of its having then become a chose in action. In the case of *London v. The Collegiate Church of Southwell* (2) it was said that a lease by a prebendary, under the words “commodities, emoluments, profits, and advantages to the prebend belonging,” the advowson of a vicarage would not pass, because these words imply things gainful, which is contrary to the nature of an advowson. But the report goes on, “yet an advowson may be yielded in value upon a voucher, and may be assets in the hands of an executor.” But the case was decided on the particular meaning of the words used, denoting something gainful. No question was made, but that if proper words had been used the advowson would have passed. And there can be no doubt whatever, that the next presentation, if the church be full, is of value, and would be saleable by law, and would be assets in the hands of an executor; and the only distinction between a presentation where the church is full or void, is, that in one case it is not simoniacal, to sell it, and in the other it is. But though it be not saleable as the subject of profit it is not the less a chattel, or the less belongs to

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(1) 3 Burr. 1514.

(2) Hob. 303.

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the executor. An outstanding term to attend the inheritance, or a term in trust for other purposes, cannot be made the subject of sale, or be made available assets in the hands of the termor, but they go to the executor. It is also contended by the defendant, that the rule does not hold universally, even in the case of lay patronage; for that in the case of donatives the right of presentation vests in the heir and not in the executor, as was decided, after two arguments, in the case of *Repington v. The Governor of Tamworth School*(1). Though the \*case must have been very much discussed, the grounds of the decision are not given at length; but it was said, "that before the Council of Lateran all benefices were like what donatives are now; that no lapse could have occurred in ancient times, and that Bishops had no right of institution before the reign of Richard II." "Ante concilium Lateranense," says Bracton, "nullum currebat tempus contra præsentantes," Selden's History of Tithes, c. 12, fo. 380. When Richard the Second is mentioned in Wilson it must be a mistake in the reporter; it should be Richard the First.

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It will require some detail of the history of the church in earlier times, and of lay patronage and lay investitures, and the law of lapse, to shew how what is stated in Wilson could be any ground for the presentation being adjudged to the heir; but, when that is done, I think it will appear that the decision is quite proper, and founded upon the original state of church patronage and the law of lapse, and that the short minutes of the reporter, when expanded into a fuller explanation, were really what was the substance of the decision.

It will be seen, however, by what I am about to state, that though the law of lapse took place nearly about the same time as the right of institution by the Bishops, yet that they were measures wholly unconnected, though both of them are applicable to the right of the heir in the case of donatives.

In the early ages of Christianity, the Bishops had probably the appointment and regulation of the inferior clergy, who were to perform divine service, and to preach in such places as the Bishop thought best calculated to promote the cause of religion, and they

(1) 2 Wils. 150. It appears by the case of *Collins v. Saurey*, 4 Br. P. C. 692, that Repington was both heir and executor of the deceased patron.

were to be paid out of the funds which went to the common treasury of the diocese, and over which the Bishop had the disposal \*for himself, his clergy, the poor, and the repairing of churches. But in the early centuries of Christianity there were no compulsory payments; no tithes were paid, and the whole of the funds depended upon voluntary donations and oblations made from time to time, or the produce of lands which had been given to the church. The countries of Christendom were not in the earlier times divided into parishes as they have since been, and the ministers of the church had neither permanent places in which they were to discharge their ecclesiastical duties, nor had they any permanent funds allotted to their maintenance and support. What are now called ecclesiastical livings were at that time unknown, and the early ages of Christianity will afford no guide in considering the rights of parties to church presentation or appointment. By degrees the funds of the church became increased, territorial possessions were from time to time given to religious houses, or otherwise for the purposes of religion, and about 400 years from the birth of our Saviour tithes began to be paid in some places; and in the seventh century some churches were endowed with the perpetual right to tithes; and some provincial ordinances, but by no means general, were made for their payment. After about eight centuries, the payment of them became more frequent, and consecrations of them made from time to time to churches and religious houses, as is stated in Selden on Tithes; and in these centuries there were some provincial constitutions of the clergy directing the payment of tithes; these, however, were probably not much more attended to than the inclination of persons led them to do, but that inclination no doubt increased among all classes. In the year 855 there is a charter of Ethelwolf, in which, \*with the consent of his Bishops and his princes, he directs some tithes to be given to the church: but what was the exact language of this charter and the extent of the ordinance, the older historians are by no means agreed. Different Kings after him, before the Conquest, made different orders for the payment of tithes; but it is by no means clear that the payment of them was even then altogether general or compulsory. Soon after the Conquest the payment

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of them seems to have become general, though not always to the churches of the parishes where they arose. That Council of Lateran which was held in 1215, endeavours to alter some usages which had prevailed to the contrary, and directs all payments in future to be made to the parish church; but it seems doubtful whether this obligation to pay to the parish church was fully established till the General Council of Lyons in the year 1274. Tithes, however, were not the only possessions of the church. Lands were from time to time given for religious purposes. Some were given to religious houses, that they might dispose of the profits. The clergy are said at one time to have had their general residence in the same place with the Bishops, except when they were on their missions; but by degrees, as devotion increased, the clergy came to reside more permanently in particular places, and some persons gave their tithes, and others appropriated their land for their support, and others built churches; and persons would become more willing to endow the church founded chiefly for the use of themselves and their families and tenants, if they could have the liberty of giving the incumbent there resident a special and several maintenance, instead of the former community of the clergy's revenue remaining. There is no doubt \*but the Bishops would give their sanction to these foundations, and the profits of the several churches would be restrained to the incumbents. It does not very well appear when these lay foundations began in England. It appears from Selden's History of Tithes, c. 9, s. 4, that the first instance that occurs is about the year 700, and he says, that about the year 800 many churches, founded by laymen, are said to have been appropriated to the Abbey of Crowland, and by this time probably lay foundations had become very common, and parochial limits assigned to the incumbents; though from other parts of Selden's work it seems that the payment of tithes did not always correspond to the parochial divisions till some centuries afterwards.

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When gifts were first made to the church, and churches founded by laymen, it does not always appear to have been done through pure devotion. For in some countries of Christendom, at least, the patron sometimes arbitrarily divided part with the

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incumbent, and what the incumbent did not receive, the patron took to his own use, and by different Councils of the church lay patrons were forbidden from making such a disposition. The lay patrons, however, in their new created churches, claimed a right of collation or investiture, whereby the incumbent might receive full possession without the aid of the Bishop or other churchman; and notwithstanding some imperials were made against this course of proceeding, the lay patrons could not be prevented from claiming the patronage, and they took upon themselves not only the advocacy or advowson, that is, the defence or patrocinny of the incumbent's title, but also the collation by investiture, without presentation, at any vacancy. And the right of advowson \*whereto the right of investiture was in these times annexed, the Bishop in some places confirmed to the patron by putting a robe or some other thing upon him at the dedication. And from this right of collation and patronage reserved by lay patrons, the practice came to be, that parish churches, and all the temporalities annexed to them, as the glebe and tithe, were at every vacancy conferred by the patron on the new incumbent by some ceremony of investiture, with these words, "accipe ecclesiam," or the like.

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Upon these presentations the Bishop did not institute as has been done since. And the incumbent as really, fully, and immediately received the body of his church, and his glebe, and such tithes as were joined with it in point of interest, from the patron's hands, as a lessee for life receives his lands by livery of the lessor.

These investitures by lay patrons were very objectionable to the church, and in a General Council at Constantinople in 870, some attempts were made to prevent them; and in the Council of Rome, in 1078, further regulations were endeavoured to be made against them: there is a canon against them, and in the Council of Lateran, in 1119, many decrees were made to the same effect; and soon after a General Council, which was held in 1138, they became less frequent, and institution now and then followed upon presentation. And as the canons acquired force, and the papal power increased, it appears to have been out of use about the year 1200, but till then it was not left off.

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So, also, Selden in his History of Tithes, c. 12, s. 5, says, "But after such time as the decretals and the increasing authority of the canons, about the year 1200, had settled the universal course here of filling churches \*by presentation to the Bishop, or as it seems it sometimes was to the archdeacon, or to the vicar of the Bishop, as guardian of the spiritualities, that use of investiture of churches and tithes severally or together, practised by laymen, was left off, and a division of ecclesiastical right from thence hath continued in practice. Neither did the King afterwards, much less common persons, fill their common parochial churches without such presentments to Bishops,—parochial churches, for of special donative chapels we here speak not; neither were appropriations of churches and tithes afterwards allowed that had not confirmation from the ordinary, immediate or supreme."

Up to this time, therefore, benefices were donative. The patrons had the whole of the advowsons in their own hands; they invested the incumbent with the full possession of the church, either severally or together, and the incumbents were in the nature of lessees for life under the patron. There was then no law of lapse, and the investiture of the incumbent might take place wherever it suited the patron, though the patron, by ecclesiastical censures, might be compelled to fill the church. I do not find any statement that in these times the patrons took the profits of the benefices to their own use; but there can be no doubt that it was so, because, in the case of donatives, even now when the rights of the lay patrons are so much less than formerly, the patrons are entitled to take them; though, according to Selden, they cannot institute any suit for the recovery of them if they are refused to be paid. Some few donatives there are at the present day, whether they were suffered to continue as they formerly were at the time when the investiture by lay patrons was discontinued, or \*whether they have been since founded by letters patent, or licence from the Crown, or whether there are some of each, I cannot at all say.

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In the twelfth century the law of lapse was introduced. A General Council was held at Lateran in 1175, at which, our Selden says, in c. 12, s. 5, as last cited, four Bishops were sent,

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according to custom, as agents to the church of England. And Bracton, lib. 4, 241, says, ante concilium Lateranense nullum currebat tempus contra præsentantes. Lord Coke, in 2 Institute, 273 and 361, notices that Briton and Fleta describe the Council as having been held at Lyons, and not at Lateran, as Bracton does, but it is not material where it was held. Selden, however, says, "by that Council, after vacancy of six months, the chapter is to bestow those churches which the Bishop being patron had left so long void, and upon their default the metropolitan. But no word is of lay patrons in it; yet by reason of the authority of that Council, and a decretal of the same Pope (Alexander the Third) which speaks of like time upon default of lay patrons, it hath been since taken here generally that, after vacancy of six months, the next ordinary is regularly to collate by lapse." It appears, therefore, that nearly about the same period of time the discontinuance of investitures by laymen, the law of lapse, and the payment of tithes in the parishes where they arose, were introduced. These measures, however, were wholly unconnected with each other, though they all arose from the increasing authority of the church and the force of the canons.

In the case of donatives, which I consider all benefices of lay patronage to have been, and, as I have before endeavoured to shew, as long as the right of \*institution was in the patron, the complete dominion remained with the patron. When the church is vacant, he is entitled to take the profits to his own use, but he has no remedy to compel payment, and if a stranger takes them, the patron cannot bring an action for them, but must put in a clerk, who is to sue. It is said by POPHAM, Ch. J. in *Fairchild v. Gaire* (1), that the patron may take the profits, and sue for them in the spiritual Court, and though the other Judges differ with POPHAM, yet I consider their point of difference to apply to his opinion, that if the patron will not collate, there is no remedy to compel him, but he is left to his conscience; for when they are said to be *contra*, they say that the ordinary may compel him to collate a clerk, and give their reasons, but, as they say nothing about the patron taking the profits, I do not understand them to differ upon that point. The same point was put in argument in

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*Britton v. Ward* (1), where it is said that when the church is void, the patron may take the profits to his own use, if the parishioners will pay them, but he has no remedy to compel them to pay their tithes to him. The same case of *Britton v. Ward* is reported in Cro. Jac. p. 515, but there called *Britten v. Wade*, and there it is also said, "but if any take the profits from him he cannot maintain the action, but he ought to put in his clerk, and he maintain the action;" but the language there is, that the patron of a donative may *lose* the profits if he will; that is evidently a mistake, it is not proper English, and is not consistent with what follows: the mistake seems to arise from the translator taking the French word to be *perdre*, instead of *prendre*, \*it is *prendre* in Rolle's Reports; and in Mallory's Quare Impedit, 35, where this case is cited, he says the patron may *take* the profits. So also Burn, in his Ecclesiastical Law, title "Vacation," says that in case of donatives the patron may take the profits during the time of vacation.

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Donatives may be resigned by the incumbent to the patron, *Fairchild v. Gaire*, as before cited in Yelverton, 60, and Cro. Jac. 65, where the Court held that a donative begins only by the erection and foundation of the donor, and he hath the sole visitation and correction, the ordinary nothing to do therewith; and, as he comes in by him, so he may restore to him for *unum quodque eodem modo quo colligatum est dissolvitur*. And although the presentee, when he is in, hath the freehold, yet he may revest it by his resignation, without any other ceremony, and the ordinary hath nothing to do therein. And in the Year Book 6 Hen. VII. c. 14, Keble says, that if the founder ordain that he and his heirs shall present, then the ordinary shall have nothing to do with it; and Brooke, Presentacion al Esglise, in referring to the Year Book just cited, says, where a free chapel donative is void the founder may retake it, and need not appoint any other incumbent.

The old history of the church, as well as the more modern cases, treat donatives as being the entire property of the patron; if the church be void, the freehold is in him, though perhaps upon consideration of all the authorities on both sides, he may

be compelled by ecclesiastical censures to fill it, but in the meantime he may enter upon the glebe and take the profits of that and the tithes; and if he may take them, his heir may take them after his death, as the foundation of the \*church is on behalf of himself and his heirs; and as there is no lapse in the case of donatives, this taking of the profits may continue till the church is filled; but if the executor could collate to the church, that would be adverse to the right of the heir to take the profits; and I think that from the whole of the law of donatives the right to collate is in the heir, and does not at all clash with the right of the executor as to benefices, which are presentative for institution. And though it may be said that the right of presentation is as completely severed from the advowson in case of a donative as in a presentative living, I do not so consider it, as the nature of a donative is such that the whole vests in the patron and his heirs, who may take the profits during the vacancy, and, therefore, the executor has nothing to do with it. But the defendant contends, that supposing the case of the donative to be accounted for by any means as constituting a well founded difference from a benefice presentable for institution, yet that the case of ecclesiastical persons having benefices in right of their church is at all events different, and the first instance that is shewn is the case of a Bishop who in right of his bishopric has an advowson, and the church becomes void and he dies, the King shall present. For this are cited 2 Rolle's Abridgment, 345. "If a church of the patronage of the Bishop void in the time of the Bishop and after the Bishop dies, the King shall have the presentment by reason of the temporalities, and not his executor;" Brooke's Abr. Presentacion al Esglise, 10, "Where the avoidance is of a benefice belonging to the Bishop, and he dies before he makes collation, the King shall have it by reason of the temporalities of the Bishop, and not the executors of the Bishop." \*Fitzh. N. B. 33, "If the Bishop die, and the advowson happen void before his death, the King shall present to the same by reason of the temporalities, and not the Bishop's executors." Co. Litt. 90 a, "If a Bishop have an advowson, and the church become void and the Bishop die, neither the successor nor the executors shall present, but the King, because it is but a chose in action."

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Co. Litt. 388 a, "If a church become void in the life of a Bishop, and so remain till after his decease, the King shall present thereto, and not the executor or administrator, for nothing can be taken for a presentment, and, therefore, it is no assets." The reason given in Co. Litt. 90 a, that it does not go to the successor or executors, because it is a chose in action, does not appear at all satisfactory, because choses in action do go to the executors. And there is a note by the writer of the earlier notes to Co. Litt. who gives this explanation of the passage, "that in the case of a chose in action, so peculiar as the right of presentation, the law favours the King more than the Bishop's executors, and, therefore, gives the King, as having in his custody the temporalities of the vacant bishopric, that presentation which in general executors are entitled to when opposed to an heir." And the writer of these notes, after discussing the reason of the presentation belonging to the King, comes at last to the conclusion, that it is most safe to rely on the right of the King, as settled by authorities and long practice. In none of these authorities is there any mention made of the successors, except in Co. Litt. 90. But they are all, even in Co. Litt. 388 a, as to the King's right as opposed to that of the executors, and, consequently, if the King had not the right, treating it as if it would go to the \*executors. It is true, that in the Year Books to which these authorities refer, there is nothing about the executors. If there had been it would have been stronger; but as it is, there is the statement of Brooke, Rolle, Fitzherbert, and Coke, as to the claimants, and, therefore, their opinions, that the law was that, except for the right of the King, it would go to the executors. But indeed the right of the King is so strong, that in 2 Rolle's Abr. 345, it is said, if a church of the patronage of a Bishop, abbot, or prior, voids, and the Bishop, abbot, or prior presents, and afterwards dies before institution, the King shall have this presentment by his prerogative, *The Prior of Bermondsey's case*; and so in the same book and page, "if the Bishop, abbot, or prior dies after institution of the clerk and before induction, the King shall have this presentment by his prerogative."

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It seems from the next placitum in Rolle, as if the contrary had been held in one case, but there seems no reason to doubt

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the position ; for, in F. N. B. 34, K, it is said, if a Bishop make a collation, and before induction or installation dieth, and the King seizes the temporalities, he shall have the presentment, because that the church is not full against the King until the parson or prebend be installed or inducted. And the same point seems admitted in Fitzherbert's N. B. 36, K, though there the King did not prevail, because he ought not to have given the prebend to his own clerk, but should have removed the clerk collated by the Bishop, by *quare impedit*. And the same point is in Bro. Presentment al Esglise in one part of pl. 13. The instance of the Bishop dying before presentation, after the right had vested in him, is not the only one where the King's prerogative gives him the right to present. For if the tenant of the King has an \*advowson, and an avoidance happens, and after the tenant dies, his heir in ward to the King, the King shall have the presentation and not the executor of the father, though the heir be of full age : 2 Rolle's Abr. 345, pl. 1 ; and in Co. Litt. 388 a, if the King's tenant by knight's service *in capite* be seised of a manor, whereunto an advowson is appendant, and the church become void, the tenant dieth, his heir within age, the King shall present to the church, and not the executor or administrator ; but if the land be holden of a common person, in that case the executor shall present and not the guardian. So in Co. Litt. 90 b, in speaking of the King's right he says, So it is, in case where the King hath wardship, but that is a prerogative that belongeth to the King, to provide for the church being void ; for where the tenure by knight's service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant. And so if the tenant of the King has an advowson and an avoidance happens, and the tenant presents and his clerk is admitted and instituted, and before induction the patron dies, and the advowson comes by wardship to the King, he shall present, for the church is not full against him before induction, 2 Rolle's Abr. 345. Other cases may be put, though not applicable to the case of executors, where the King's prerogative gives him a right to present where a subject would not. As if the youngest daughter, coparcener, be in ward to the King, and the church becomes void, the King

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shall have the presentment alone, and not the other coparceners, 2 Rolle's Abr. 344, pl. 8. These cases, therefore, which are excepted out of the rule, that executors shall present where the chattel is vested, must be confined to those cases where the King, by his prerogative, \*has a right to present either in the instance of his being guardian of the temporalities in the cases of Bishops, abbots, and priors, or in the instances of the King's tenants *in capite*, where he has the wardship. In all these instances, the question has been between the King and the executors; and in case of the Bishop, no surmise (except that in one of the cases there mentioned) was ever made, that the successor would have the presentation in case the King had not been entitled by his prerogative.

Another exception to the rule is alleged, that in case of a person holding an office, in right of which he presents to another office, and that other office becomes void in the lifetime of the patron, and the patron dies, his successor, and not his executor, shall appoint to the office; and the case of *exigenter* is put as reported in *Scroggs v. Coleshill* (1). To that case I entirely agree; but the reason of that is, that it is a personal thing annexed to the Judge of the Court who is to appoint the officers of the Court; and if the office becomes vacant, and the Judge dies, his executor can have nothing to do with the appointment, for it belongs to the Judge to appoint the officers of the Court. The office of Judge is not like an advowson, which is a thing which descends and is capable of being conveyed from one person to another, and the presentation of which is the fruit of the advowson. But if an advowson be annexed to an office and the church becomes void, and then the person holding the office dies, I think the right to present would be in the executor and not the successor, because it would be a fruit fallen, a chose in action personally vested in the officer.

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If the principle be established, that a vacant presentation is a chose in action, and is like a fruit fallen, and goes to the executor of a private patron, I do not see why it should not go to the executor of a prebendary patron. He is seised of the advowson itself in right of his prebend in his corporate capacity, and as

(1) Dyer, p. 173.

long as the prebend remains in him, he has it in his corporate character. But it is only the prebend itself, and the advowson which he has as such ; the proceeds of a prebend stand upon a different ground. These proceeds do not belong to him in his corporate character, for if they did, they could only be enjoyed by him while he exercises that character. The produce of the lands, such as corn, hay, fruits, and vegetables, come to him to be eaten, consumed, or sold at his pleasure. So the rents of the lands of the prebend, when they fall due, are to be received by him for his own private use, and not to be laid out on his prebend, but at his own pleasure. In the case of death, such of these issues and profits as remain fallen or due, but have not actually come into the hands of the prebendary, do not go to the successor, or the King, or the ordinary, but go to his executors, as any other part of his personal property. The reason is, because these things, by being severed from the prebend, become chattels, and are no longer parcel of the prebend ; and no persons, who afterwards have any interest in the prebend, either direct or incidental, can claim what has thus been severed from it. The same rule holds as to the issues and profits of any thing which is appurtenant to the prebend, and which become chattels, such as proceeds of fisheries, common of turbary, housebotes, and other things which have been taken and remain in specie \*at the death of the prebendary : for things appurtenant to the prebend are as much parcel of it as if they were of the actual *corpus* of it. The general principle of such manual chattels and choses in action as I have mentioned being admitted, it is to be considered, whether the right of presentation to a church is to be considered in the same light. In the case of a private individual, if for “ prebend ” you substitute “ manor,” there is no doubt upon the current of all the authorities. The species of property is the same : in the one case it is an advowson appendant to a manor, in the other it is an advowson appendant to a prebend in right of the prebend. But in both cases it is an advowson, and being an advowson, it must partake of the qualities applicable to an advowson.

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In the case of lay patronage the vacant presentation becomes severed from the inheritance ; but if that be the nature of an

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advowson, that a right to a presentation becomes severed from the inheritance, it must have that quality throughout, to whomsoever the advowson belongs, or in whatever right it is held ; for otherwise great confusion would ensue. And if it be a chattel it must go as all other chattels do. A chattel does not go to the successor of a corporation sole, except in the case of the King : Co. Litt. 90 a. But the King is altogether upon a different footing from other corporations sole. If, then, this be a chattel and should go to the successor, it would be quite an anomaly, and an exception to the general rule.

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But there is one very important instance where the right of presentation is transmissible to the personal representatives, and does not go to the successor. I mean the option of the Archbishop, which is founded on a \*grant made to the Archbishop ; and upon the death of the Archbishop during the continuance of the Bishop in his see, it will devolve on his executors or administrators ; that being a personal grant to the Archbishop, is different from the present ; but it proves, that in the highest ecclesiastical dignity in the church the principle, in one instance at least, is recognised, that it is transmissible to the personal representatives.

It has been said that this is a trust to be exercised for the benefit of the church, and that it is more proper that a spiritual person should exercise it ; but it is also an important trust if it be exercised by a layman, he, also, has a duty to perform in the selection he makes. The ordinary, both in the case of ecclesiastical and lay patronage, is to examine into the fitness of the clerk, and the only thing that can be said in favour of the ecclesiastic is, that he will make a better choice ; but that is not a principle upon which the legal rights of parties can be decided. The state of patronage is as much diversified in England as it is possible to be ; all classes in the community that can be enumerated have patronage belonging to them, and their rights are to be determined by legal principles ; and where there has been no decision or practice or received opinion, then by analogy, as far as can be collected ; but the question, what class of patrons are likely to make the best choice, cannot, I think, be taken into consideration.

In the course of the argument it has been said, that this prebend has been appropriate to the church of Salisbury, and also that the will and intention of the founder is to be considered. As to that we know nothing upon this record; all we know is, that the advowson is appendant to the prebend; but how it became so \*does not appear, or who was the founder, or what were the terms of the foundation, or by what statutes it is governed: if there were any terms or statutes they might have been shewn; if there were none, the case must be governed by the general rules of law.

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Neither can we look to the constitutions of the church of Salisbury,—they are not stated in the record; and in the absence of any thing particular in them the rules of law, as applicable to all churches in general, must prevail.

The statute of the 28 Hen. VIII. c. 11, has been adverted to. It states what things are to go to the successor of an archdeacon, dean, prebendary, parson, &c. &c., but the enumeration is of things growing, arising, or coming during the time of vacation; no allusion is made to any thing which fell during the time of the predecessor. This statute has been said to be only declaratory of the common law; whether it be so or not, cannot be material; because if it was, it would be a declaration of what the successor would take by the common law, which is only of things falling in the vacation. But as the statute directs these things to go to the successor, towards payment of the first fruits to the King, it would not enumerate things which could not be converted into money, and therefore would not include a vacant presentation, and the statute, consequently, does not affect the question.

For the reasons I have already mentioned, I think that the plaintiff is entitled to present in the present case, and that the judgment of the Court of Common Pleas should be reversed.

HOLROYD, J. [also considered that the judgment of the Court of Common Pleas should be reversed.]

BAYLEY, J. :

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This was a writ of error from C. B. in a case of *quare impedit*. The declaration stated, that William Dodwell, D.D. was seised

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of the prebend or canonry of South Grantham, founded in the cathedral \*church of Salisbury, to which prebend or canonry the advowson of the rectory of the parish church of Welby (the church in question) belonged in his demesne as of fee, in right of the said prebend or canonry, that he presented William Dodwell, and died; that Price succeeded Dr. Dodwell, and died; that Rennell succeeded Price; that the church became vacant by Mr. Dodwell's death, whereby it belonged to Rennell to present; that he died intestate, without presenting; that administration was granted to the plaintiff, and that thereupon it belonged to the plaintiff as administratrix to present, but that she was hindered by the defendants. She complains, therefore, not of a disturbance in the intestate's time, but of a disturbance in her own, and the question is, whether upon an advowson, circumstanced as this advowson is, if a right of presentation accrue in the lifetime of the prebendary, and he dies without filling it up, that right passes to his personal representative? The declaration does not describe the prebendary as seised of the advowson in right of the prebend or canonry, or indeed as being seised of the advowson at all; but it states him to be seised of the prebend or canonry in his demesne as of fee in right of the said prebend or canonry, and describes the advowson as belonging to the prebend or canonry, I think it must be taken that it was in right of the prebend and canonry only that Mr. Rennell had any seisin of or right in the advowson. But though the title to the advowson be in right of the prebend or canonry, the question is, whether the right of presentation, when a vacancy has happened, is still attached to the prebend and canonry, and to be exercised only in right of the prebend or canonry upon a continuation of the prebendary's estate in the prebend or canonry, or \*whether it does not become an independent personal right, vesting indeed in him because he was prebendary when the vacancy happened and the right accrued, but severed altogether from the inheritance and the advowson, and becoming in him a detached personal right, to be exercised by him in his own right, whether he should continue prebendary or not, and in case he should die without exercising it, transmissible by him as a personal right to his executors or administrators. The latter is the right which the

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declaration states. It does not state that Dr. Dodwell presented in right of his prebend or canonry, but simply that Dr. Dodwell presented; and upon the vacancy in question, it does not state that it belonged to Mr. Rennell in right of his prebend or canonry, but simply that it belonged to Mr. Rennell to present, and upon the best consideration I have been able to give this case, I am of opinion, that in the absence of any custom to controul it, this is the correct mode of statement; and that though the prebendary acquires the right of presentation because he is prebendary, and in right of his prebend or canonry, the right when once acquired becomes his own private personal right as the right to the underwood he has cut, or the grass he has mown, or the fruit he has gathered from his prebendal lands. I have no difficulty in saying that I came to the argument in this case with a very strong impression upon my mind against the plaintiff's right, but the light which was thrown upon the subject by the powerful argument of *Mr. Patteson*, and the authorities to which I have referred, have induced me to think that my first impressions were erroneous; and though I might think it would be better if the right were to be inseparable from the stall, I cannot find legal principles to carry me to that conclusion.

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The first point I shall consider is, what is the effect of a vacancy, in case of a presentative living, and I take it to be clear that it immediately gives a new personal right, a right arising from property in the advowson, but from the moment of its creation, ceasing to depend upon, or to be influenced by it. Whatever may become of the advowson, though the right to it instantly ceases, the right of presentation continues untouched. In the common case, where a church becomes vacant and the patron dies, the advowson descends upon his heir; but to whom does the right of presentation pass? To his heir? No; but to his personal representative. And why? Because it is no part of the advowson; it is a personal right yielded by the advowson, a fruit created by it, but it is no part of the advowson, it is wholly independent of it. *Fitz. N. B. 33, P.* puts the case and gives his reason. If a man be seised of an advowson in gross or in fee appendant unto a manor, and the church become void, and he die, his executor shall present, and not his heir. Why? Because it

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was a chattel vested, and severed from the manor. The same point, without the reason, is put 21 Hen. VII. pl. 6, Bro. Present. à l'Eglise, 34. If A. be tenant in tail of an advowson, and the church become vacant, and A. die, A.'s executor shall present, not the issue in tail, F. N. B. 34, B. If tenant in tail of a manor to which an advowson is appendant, make a lease (before or not within the statute of Hen. VIII.) which will end with his death, and the church becomes void, the tenant in tail dies, so that the lease is become void, the lessee shall nevertheless have the presentment, 10 Edw. III.(1). If I grant land, \*to which an advowson is appendant to husband and wife in tail, the husband dies, the widow marries J. S., the church becomes void, the woman dies without issue, J. S. shall present, for though the right to the land is wholly in me, the right to present is in him, 38 Hen. VI. 36 B. If baron be seised of an advowson in right of his wife, and the church become void, and the wife die before issue had, still the husband shall have the presentment: 21 Hen. VI. B., Bro. Presentment à l'Eglise, pl. 22, Co. Litt. 120. If a manor, with an advowson appendant, be assigned to a widow for dower, and she marry again, and the church become void, and she dies, her second husband shall present: 14 Hen. IV., 12. If whilst a church is void, the patron be outlawed in trespass, which works a forfeiture of goods and chattels, the King shall present: Br. Presentment à l'Eglise, 22. "If a man have an advowson for a term, and the church during the term become void and the term expire, the termor shall nevertheless present:" F. N. B. 34 B., Bro. Presentment à l'Eglise, 22. Lastly, if a vicarage become void, and before the parson present he be made Bishop, he shall nevertheless present, because it was a chattel vested in him: F. N. B. 34 N. These authorities appear to me to prove, beyond all question, that upon a common presentative benefice a vacancy creates a new right from thenceforth, detached from and independent of the advowson, and liable to go in a different line from the advowson; and the next point I shall consider is, what is the legal character of this right? And I take it to be a chattel, and a chattel only. I am aware that in different books

(1) Taken from the index to the Year Book,—not to be found in the book itself.

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different names are given to it, that it is called a personal thing, annexed to the person of him who is patron in expectancy at the time of the vacancy \*(Dyer, 283 a, Gibs. 797) ; a thing in right, power, and authority (Dyer, 283 a, Gibs. 797) ; a chose in action (Dyer, 283 a, Gibs. 797, Co. Litt. 90). The fruit and execution of the advowson, not the advowson itself (Dyer, 283 a, Gibs. 797), and a trust in the hands of the patron, by consent of the Bishop, for the benefit of the church and religion (Gibs. 796) ; but notwithstanding all these descriptive and figurative expressions, its legal character seems to me that of a chattel only. I am aware, too, that in *Rex v. The Archbishop of Canterbury* (1), where the question was, whether a grant from the Crown of the goods and chattels of felons and outlaws would pass a right to present to the advowson of an outlaw, where the church became vacant after the outlawry, ANDERSON, Ch. J. said (according to Owen) that an avoidance was no chattel, or right of chattel, which PERIAM denied, but, according to the reports in Leonard, ANDERSON considered it as a right, a thing in action, a *jus presentandi*, but he thought the words "goods and chattels" not proper words to pass it, and that they were confined to household goods, money, and the like personal things, and things in possession ; but *Shuttleworth*, Serjt., who argued against its passing by the grant, admitted it was a special chattel capable of being granted ; and WALMSLEY and PERIAM, JJ. both stated it was a chattel, and though it may be immaterial to the decision of this case, what particular species of chattel this may be, which seems there to have been the question, it appears to me, upon other authorities, that it clearly is a chattel of some description. The right to present upon a grant of the next presentation cannot differ in nature from \*the right which devolves upon the patron in case of vacancy where there has been no grant, and in such case Brooke considers the right granted clearly as a chattel. In 34 Hen. VI. 27, pl. 38, a grant of the two next presentations was made to J. N. and his heirs, and it was alleged upon the first vacancy J. N. presented, and upon the second his heir, and per MOILE, J. the heir had no title to present, for the executors ought to present in this case, and not the heir, notwithstanding the form

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(1) Owen, 155 ; 1 Leon. 201 ; 4 Leon. 107.

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of the grant. Brooke abridges this case, title Chattels, pl. 20, and Estates, pl. 51, and he has a similar case, title Chattels, pl. 6, and in each he gives as the reason, that the right to present in such case is "a chattel." If one grant the two next presentations of a church to A. these are chattels, and if A. die the executors shall have them, not the heir, Bro. Chattels, pl. 20. A man grants the next presentation to a church to A. and his heirs, or lease for years to him and his heirs, the executor shall have this and not the heir, for the heir shall not have "chattels : " Bro. Est. pl. 51. A man grants to another the next presentation to a benefice, and the grant was to him, his heirs, and assigns ; and, yet, it was admitted clearly that it was but a chattel notwithstanding this word "heirs," for it is but for a term, and where a thing is but a chattel, this word "heirs" cannot make it an inheritance. The same law of a lease for twenty years to A. and his heirs : Bro. Chattels, pl. 20. In the cases I have mentioned from F. N. B. 33 P. and 34 N., the right to present, which accrues to the patron upon a vacancy, is called a chattel, and so it must have been considered : Co. Litt. 388. Indeed, how can an executor or administrator have any right to it, except on the ground of its being a chattel ? The statutes relating to administrators, use the word "goods" only. By the \*18 Edw. I. c. 19, the ordinary shall answer the debts as far as the goods of the deceased will extend. By the 31 Edw. III. st. 1, c. 11, the ordinary shall depute the next and most lawful friends of the deceased to administer the goods of the deceased, and the 21 Hen. VIII. c. 5, speaks of commission of the administration of the goods of an intestate. Upon these grounds it appears to me, that upon the vacancy of a presentative advowson, a right and interest independent of the advowson accrues to the patron, and that this is a chattel right and chattel interest.

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It remains to be seen, whether there be any thing particular in this case to take it out of the ordinary rule of chattels. And one ground insisted upon is, that this right accrues to the prebendary in right of his prebend, and that it is commensurate with his continuance as prebendary, and that when he ceases to be prebendary the right is gone. But is there any authority to warrant this conclusion ? I agree that the right accrues to him

in right of his prebend, because he is prebendary ; but when the right has accrued by the vacancy, I deny that it is dependent upon the prebend or to cease with it, but I insist that, like all the instances I have put in the early part of what I have been stating, it is independent of, and unconnected with the advowson, and a distinct independent chattel. The case put, F. N. B. 34, of the parson who is made a Bishop, is upon principle in point, but it is not the only case. Co. Litt. 90 a, and 388, in the case of a ward, is in point also. The objection is, that the chattel interest is acquired not in his personal, but in his corporate character. The parson in F. N. B. acquires his right, the very same species of right in the same way. In Co. Litt. 90 a this case is put, "A tenant holds of a Bishop by knight's service, the Bishop has the \*seigniorship in right of the bishopric, the tenant dies, his heir within age, the Bishop either before or after seizure dies, neither the King nor successor shall have the wardship, but the executors. For albeit the Bishop hath the seigniorship *en auter droit*, yet the wardship being but a chattel, he hath in his own right, and a chattel cannot go in the succession of a sole corporation unless it be in the case of the King." The same point is put more shortly, Co. Litt. 388 a, "If a Bishop hath a ward fallen and dieth, the King shall not have the ward, nor the successor, but the executor, and the ward shall be assets in his hands. So it is of a heriot, relief, or the like." Now this, as it seems to me, bears a strict analogy to the present case: the Bishop there has a seigniorship in right of his see; here, the prebendary has an advowson in right of his prebend; a chattel accrues from each; a wardship in the one case, a right of presentation in the other. The wardship goes to the Bishop in his own right. Why shall not the right of presentation in the other? The former goes to the executor, why shall not the latter? The only difference between the two cases is, that the wardship is assets; the right of presentation is not, though the damages for an obstruction to it would be. But is this difference material? A right of presentation, though not assets, goes to the executor in ordinary cases. The only recognized exception is in the case of the King. The constituting assets, therefore, is not the criterion. But in the very case of bishoprics, there is a difference between the case

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of wardships and the case of a right of presentation ; the former went to the executor, the latter to the King. Will this, therefore, furnish a ground upon which the defendant in error can stand in this case ? Can he shew \*that this is founded upon the nature of the right, viz. a right of presentation, and that it extends to all cases of such a right ; or will it not appear that it extends to all cases of the King upon a tenure *in capite*, and that it is confined to the King and that peculiar species of tenure ? The case I have already mentioned from Fitzherbert, viz. the case of the parson made Bishop, shews that it is not founded upon the nature of the right, viz. the right of presentation ; and the fact that it extends to cases of wardship, upon a tenure *in capite* in the King's case, shews that the peculiarity results from the peculiarity of tenure and the rights of the Crown, and not from the nature of the right. The general rule is, that a chattel cannot pass by succession from predecessor to successor : Co. Litt. 9 a, 46 b, 90 a. But by custom it may ; as in the case of *The Chamberlain of the City of London*, where, by the custom of the city, a bond to the chamberlain for orphanage-money will pass to the successor : *Fulwood's case* (1), *Byrd v. Wilford* (2) ; or it may be the terms and conditions of a tenure. And it is to this I attribute the peculiarity in the case of the Bishops, upon which great stress was laid in the argument, rather than to the spiritual right in respect of which they hold their possessions. If, for instance, a living becomes vacant, of which a Bishop, in right of his see, is patron, and the Bishop dies, the right to fill up that living passes with the other temporal rights of the see to the Crown. And though the Crown restore the temporalities to the successor, without filling up the vacancy, the right to fill it up remains with the Crown. But I do not find this to be the case with respect \*to advowsons in the patronage of any other corporations sole ; and I find, that in the case of the Crown there is a similar peculiarity in the case of every tenure *in capite*. If the King's tenant *in capite* hold an advowson as parcel of his advowson, and the church become void, and the tenant die without presenting, the right of presentation, if the heir be of full age, will be in the tenant's executors ; but if the heir be

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(1) 4 Co. Rep. 64 b.

(2) Cro. Eliz. 464.

within age, the right will be in the Crown. Upon what, then, does this right in the Crown depend? Clearly not upon the spiritual nature of the property, because it is a right of presentation; for if the heir were of full age he would have it, but upon this, that according to the terms and conditions of the tenure, if the land came to the Crown for wardship or otherwise, whilst the church was void, the right of filling up the church should be not in the executors of the tenant, but of the Crown. And in the same way in the case of a bishopric, the right of the Crown may be founded upon this, that according to the terms and conditions of a tenancy of the Bishop (for every Bishop always held of the Crown), whenever a bishopric became vacant, the right of filling up all vacant churches within the patronage of the see should be, not in the executors of the Bishop, but in the Crown. This, as it seems to me, accounts satisfactorily for the peculiarity of the case of Bishops, puts them upon the same footing as other tenants *in capite* (Co. Litt. 70 b), and makes the peculiarity of their case inapplicable to the present.

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The only remaining argument against the plaintiff below (I believe) is founded upon the case of donatives. But when the distinction between donatives and presentative \*benefices is considered, and attention is paid to the ground upon which *Repington v. Tamworth School* (1), was decided, the case of donatives, as it seems, will furnish no argument which can bear upon this case. In case of a presentative benefice there is a duty upon the patron to present. The public is considered as having an interest in there being a prompt and speedy presentment. A neglect is punished by lapse. This is, I apprehend, the foundation of the right the law creates when a vacancy occurs. The right is the consequence and offspring of the duty. But in case of a donative, the law recognizes no such duty, and the miserable report of the case we have in *Wilson*, states as the ground of the decision, that in the case of a donative there is no lapse. I am aware that it was said *arguendo* in *Colt v. Glover* (2), that it had been agreed in *Gaire* ats. *Fairchild*, that the ordinary might sequester a donative if the patron would not present; and that according to the report in *Yelv.* 61, *GANDY, FENNER*,

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(1) 2 Wils. 150.

(2) 1 Roll. Rep. 453, Hil. 14 Jac.

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YELVERTON, and WILLIAMS (against POPHAM, Ch. J.), held that the ordinary might compel the patron to collate some clerk; but this point was not necessary to be decided in that case, for the only points were, whether the incumbent could resign to his patron, and whether his resignation was good. I do not find this point mentioned in the contemporaneous reports, Cro. Jac. 68, Moore, 765, or in Co. Litt. 344 a, which contains the substance of this case. I have never heard of any instance of a proceeding in the spiritual Court to compel the filling up a donative, and the case of *Repington v. Tamworth School* appears to me to have proceeded on the supposition, that there was no power \*to compel the patron of a donative to fill the church, and that the necessity, therefore, of raising a personal right detached from and independent of the advowson did not arise. Why should the question of lapse have been mentioned, except to shew this distinction between a common benefice and a donative, that in the latter it was optional in the patron to fill the church or not; and that the law, therefore, did not raise a chattel out of the inheritance, as in the case of a common benefice, because until the patron took the step to fill the church, it was not certain he would ever fill it, and until he chose to exercise his right, it would remain in the inheritance as part and parcel of the estate. Upon these grounds I am of opinion that the case of a donative is distinguishable from this case, and that we are not warranted by the case in *Wilson* to take this out of the ordinary case of presentative benefices. The point, that the prebendary is a spiritual, and not a lay corporation, I do not particularly notice, because it is clear the prebendary has no cure of souls, his functions are not of necessity spiritual, the filling up his church is not a spiritual function. Until the statute of 13 & 14 Car. II. c. 4, he might have been a layman, and though spiritual persons have an advantage over laymen in knowing the merits and talents of the members of their own profession, it is to be presumed, that when laymen have the distribution of any church preferment, they will act conscientiously in bestowing it according to the best judgment they can form for themselves, or can obtain from the opinion of others. Upon the whole, therefore, I am of opinion, that in the case of a presentative

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benefice, as this is, a vacancy separates from the inheritance a right of presentation, that that \*right is a chattel interest, that it vests in the prebendary, not in his corporate but in his individual capacity, and that there is nothing which will justify us in saying that it shall not take the direction and be subject to all the incidents of an ordinary chattel.

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Whilst I was considering this case, I thought it proper to endeavour to get what light I could upon the position in Co. Litt. 90 and 388, that the Bishop's ward would go to his executors, because that is one of the main grounds upon which my opinion rests, and had that position appeared erroneous my opinion might have been different. In my search I met with two cases, which I think right to mention, one in 40 Edw. III. 14 and the other in 2 Hen. IV. 19. In the first the Bishop of Lincoln brought a writ of ward, and counted that the infant's ancestor held of him by knight's service. *Belknap* pleaded in abatement that the ancestor died in the lifetime of the preceding Bishop. *Candish*, for the Bishop, said, he might hold of us in our own right. *Belknap* thereupon pleaded that he held of the predecessor as in right of his church, and died in his time, and said that in such case the plaintiff should have supposed in his writ that the ancestor held of the preceding Bishop, and he prayed judgment, not in bar, but of the writ. The plaintiff was driven to maintain his writ, and then he pleaded that he died after the preceding Bishop. Sed per THORPE, Ch. J. he might have died whilst the temporalities were in the King's hands, and then the ward would belong to the King. You must plead that he died in your time : which was done, and issue was joined thereon. Upon this the reporter makes this note : " It seems to me by the opinion here of this book, that if a ward fall in the time of a Bishop, and the Bishop die, and the King present another Bishop, the \*infant being within age, the King shall not have the ward, nor the executors of the former Bishop, but the successor. But that if it fall whilst the temporalities are in the King's hands, the King shall have it." This certainly is the inference from the defendant's pleading the matter in abatement, and not in bar ; for it assumes that it would have been a better writ had it stated

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that the tenant died in the preceding Bishop's time. Brooke notices this case, Gard. pl. 9, and adds, *quod nota et videtur*, if he die in the life of the predecessor, the executor shall have it, and not the new Bishop; and he refers to 2 Hen. IV. 16 and 11 Hen. IV. 80 (which I cannot find). I do not find this case in Fitz. In 2 Hen. IV. 19 the Bishop of Lincoln brought a writ of ravishment of ward, and it was said to have been held for clear law, that if a Bishop's tenant die, his heir within age, and the Bishop die without seizing the ward, the successor may seize him, and shall have a writ of ravishment of ward against any that takes him out of his possession, and some said, the successor might have a writ of ward. *Quod quære*. And it was laid down there, as it had been in 2 Hen. IV. 14, that upon ravishment of ward, it was not sufficient to impeach the plaintiff's title, defendant must shew a title to remove him, for possession is sufficient except against title. Fitzh. Gard. pl. 73, notices the position, that some said, "Successor might have a writ of ward;" and makes no comment or query. Bro. notices it also, Gard. 23, and Ravishment de Gard. 7, and in the former case inserts "Q.," and in the latter "*quod quære*;" but whether the query is to note his own doubt, or the query in the Year Book, may perhaps be inferred from his *quod nota*, &c. to the case of 40 Edw. III., but not otherwise. The latest of these two cases is two centuries before the time when Lord Coke published his comment \*upon Littleton; and from the decisive manner in which he states the point, there can be little doubt, but that what was matter of doubt in the time of Henry IV. had become matter of legal certainty before the time of James I. The matter would be likely frequently to occur, and, therefore, was not likely to remain unsettled for two centuries.

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I have not relied on the *Prebendary's* case, 24 Edw. III. 26, because he might proceed for damages only, and not for a writ to the Bishop. And yet his right to damages would be founded upon this, that the right of presentation was a chattel and part of his personal estate. Upon the whole, I am of opinion, that the plaintiff is entitled to our judgment, and has a right to a writ to the Bishop.

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This was a proceeding in a *quare impedit* brought by the administratrix of the late prebendary of the prebend or canonry of South Grantham, founded in the cathedral church of Salisbury, and to which prebend the advowson of the rectory of Welby is alleged to belong, claiming to be permitted to present a fit person to that rectory, being void. It appears by the pleadings that the rectory became void in the life of the late prebendary the intestate, and so continued until his death.

The question is, whether the administratrix be entitled to present?

The Court of Common Pleas held that she was not entitled, and gave judgment for the defendants; upon which a writ of error has been brought, and the case has been argued before us with great ability and learning. It does not appear that such a question has ever been presented to a court of law before the present occasion, nor what practice has prevailed in such cases.

Some points are settled by many decisions. If a person seised in his natural capacity of an advowson of a presentative benefice, either appendant or in gross, whether seised in fee or for life, dies after the avoidance of the benefice, the presentation for that turn belongs to the executor, and not to the heir or remainder-man.

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So if a wife seised of an advowson dies after vacancy, the husband shall present, although she die without having had issue, and he does not become tenant of the advowson by the curtesy. For this the 21 Hen. VI. 26 b has been quoted.

It is clear, also, that if the next presentation be granted, either by a natural or politic person before avoidance, this is considered in law as the grant of a chattel, and the turn shall go to the executor, and not to the heir of the grantee, even though the grant be made in words to the grantee and his heirs. In this case the thing granted must necessarily be a chattel, is not for the life of any one or more, nor does it convey an interest in fee or tail, for those are perpetual, and this only temporary.

In the case of a presentative benefice and a natural person, the void turn in the hands of the owner of the advowson is also

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called a chattel, and on that account said to pass to the executor. In the time of Queen Elizabeth a question arose whether it should pass by a grant of *bona et catalla utlagatorum* made by King Edward the Fourth. The Court of Common Pleas, in which the case arose, was not unanimous on the question. It does not appear that any judgment was given. Another point arose, upon which, it should seem, that judgment might have been given for the Queen, without deciding this point. The case will be found in \*Owen, 155, and 1 Leon. 201, and 4 Leon. 107. PERIAM, J. is reported to have said that "the presentation was a chattel, for if the patron dieth, the executor shall present, for it was a chattel vested in the testator." ANDERSON, Ch. J. appears to have thought otherwise; he says, "A man cannot be said to have a chattel, but where he is possessed of it, and here this interest is but *jus presentandi*."

In the case of a donative whereof a natural person dies seised, a contrary rule has been laid down, and it has been decided that the executor is not entitled : 2 Wils. 150.

I have not, however, found any sufficient reason for a distinction. The reasons of the judgment do not appear in the report. It may have been that the Court thought the rule as to presentative benefices not well founded, and, therefore, not to be extended. A donative, however, is of so peculiar a nature that it does not seem to furnish any argument of general weight.

There is one instance mentioned in the books, which I must own I cannot but consider as an exception to the rule even in the case of a presentative benefice and a natural person.

If the King's tenant by knight service *in capite* died after vacancy, his heir within age, the King presented. It is said that this was a prerogative right, and that, therefore, no argument can be drawn from it. The King certainly may take a chattel by virtue of his prerogative, but there is no reason for his doing so when there exists another person capable of taking. And if the void turn had been severed from the advowson, and become a chattel, the prerogative right of wardship could not attach upon it, for that could only attach upon what \*descended to the ward. If the heir were of full age,

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there is no authority for saying that the nature of the tenure would prevent the executor from presenting as in the case of tenure in socage. If the void turn were not considered as severed from the inheritance, but still remaining parcel of it, the King's right to present would be clear, and the right having once vested in the Crown would remain in the Crown by virtue of the prerogative, notwithstanding the heir attaining his age; and this upon the general rule, that a matter once vested in the Crown cannot pass but by special grant of record. If the case of the tenant *in capite* be considered as an exception to the general rule, that case, as well as the case of a donative, will shew, that even where a natural person is seised of the advowson, the right of the executor is not universally acknowledged. But the question now before the Court does not arise on the case of a natural person. The intestate was seised of the advowson in his politic, and not in his natural capacity. If he had presented he would have presented not in his personal right, but in right of his prebend. And the question, therefore, is, whether the rule admitted to prevail generally in the case of natural persons, and so far as regards a presentative benefice, with one exception only, if there be one, is to be extended to a person seised in a politic capacity? and I must say, I think it is not. I have not found any reason satisfactory to my own mind for considering the void turn as a chattel, on a question between the heir and executor of a natural person. The turn is not assets; nothing can be made of it for the payment of debts; and, therefore, the rule cannot be founded upon any consideration of that kind. I do not think the want of a satisfactory \*reason to be a sufficient ground for overturning a rule grounded upon the authority of decisions, and of a practice long continued. But when, as at present, a question arises, whether such a rule shall be applied to a new case, I think the want of such a reason authorizes me to say that it ought not to be so applied, if any distinction between the cases can be discovered. It is true, that a successor in a sole corporation cannot, according to general rules, take a chattel by succession; but it is also true, that a sole corporation cannot in that character take a chattel; and though granted to a corporator and his successors, it will vest in

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him, not in his politic or corporate, but in his natural capacity: *Arundel's* case (1). And if a sole corporation cannot take a chattel by grant, how happens it that the void turn shall become a chattel vested in the corporator? Can vacancy so far change the nature of the thing as to vest that right in him in his natural capacity, which before vacancy he had in his politic capacity? The only authority that I have met with in support of such a doctrine is in Fitzherbert, N. B. 84 N. It is there said, "If a vicarage happen void, and before the parson presents he is made a Bishop, yet he shall present to this vicarage, because it was a chattel vested in him." This proposition is not supported by a reference to any decision, and rests, therefore, upon the authority of Fitzherbert, which is certainly entitled to great respect. But if the opinion of that learned Judge was grounded only upon the prevalent notion that a void turn was a chattel, and this can be shewn inapplicable to the case of a politic person, it will lose its weight. Standing alone as it does, I cannot think it sufficient \*to bind the judgment of the Court. In the case itself, however, there is no necessary change in the nature of the right; the presentment would be made by a person in whom the right had at one time vested. The same events might happen on the translation of a Bishop, but I have not found by whom the presentation has been made under those circumstances. The presentation of the Crown on the death of a Bishop appears to me, for the reason that I shall mention hereafter, to be inconsistent with this opinion of Fitzherbert. And if this opinion of Fitzherbert be law, a presentation by the prebendary himself, will not be made in his politic, but in his natural capacity; not in right of his prebend, but in his personal right, and he might make his presentation in the same form as a natural person, and without naming himself prebendary, which I apprehend to be contrary to all practice, as it certainly is contrary to the last presentment to this very benefice, of which a copy is quoted at length by the LORD CHIEF JUSTICE.

It is clear that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore,

(1) Hob. 64.

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she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate, but I find no authority for saying that she is the administratrix of his politic rights or property also.

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It is not necessary in the present case to decide in whom the right is. It is sufficient for the purpose of this judgment to say that it is not in the plaintiff. My \*opinion would, however, have been less satisfactory to my own mind, if I had not been able, also, to form an opinion as to the person entitled to present. Whether, with that addition, it will be satisfactory to others it is not for me to say. In my opinion the right is in the successor. But, if the nature of it be such as that, according to any rule of law, it cannot pass to the successor, yet it will not necessarily follow that it should pass to the executor; it may devolve upon the Crown for want of title in any other person.

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If the right be considered as parcel of the inheritance, it will pass with the inheritance to the successor. The only ground for saying that the right shall not pass to the successor, is that it has been severed from the inheritance, and is become a chattel. I have already intimated that I have found no satisfactory reason for preferring the executor to the heir, even of a natural person. The case in Dyer, 283 a, has been often quoted on this point. The scæ was this: A patron granted the first and next presentation and advowson of a church, and the right of presenting to the same then being vacant, so that the grantee might nominate and present a fit person for that one turn only. Neither party presented within the six months, and the ordinary collated by lapse. The church became void again. Both parties presented: the clerk of the grantor was admitted. The grantee brought a *quare impedit*, and judgment was given against him. Six Judges appear to have held that the grant of the present avoidance was void; "for," says the reporter, who was one of the six, "it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right,

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power, and authority; and also a chose in action, and in effect, the fruit and \*execution of the advowson, and not any advowson. And yet the executors shall have it by privitie of law." It is to be observed, that this was the case of a natural person. The expression "a mere personal thing," is suited to such a case; the phrase, "*a mere prebendal thing*" would not be less suited to the case of a prebendary: the words "a thing in right, power, and authority," may be applied to a prebendary, a prebendal right, power, and authority; the words "the fruit and execution of the advowson, and not the advowson," are applicable to either case. The only phrase that leads to the exclusion of the heir or successor is the expression "a chose in action;" and this is altogether unnecessary to the judgment, which may be well supported upon the other expressions used by the reporter. In the present times, I apprehend, such a question would be decided upon a more solid and less technical and subtle ground, namely, the prevention of simony.

If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will in the particular instance be exercised not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity, had, in fact, held it in his natural capacity. A decision to this effect will be contrary to the nature of the right. A decision against the administratrix will be contrary to the general rule by which a void turn is considered as a chattel in the case of a natural person. A choice must be made between these two difficulties. In my opinion the principles of law will be less violated by holding that the void turn is not a chattel in this case of a corporation \*sole, and thereby giving the presentation to the successor, who will present in right of the prebend to which the advowson belongs, than by holding it to be a chattel, and thereby severing the presentation for this turn from the prebend.

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If it be said that such a severance takes place under a grant of the next presentation, which before the restraining statutes would have been good against the successor of a prebendary or Bishop, and may still be good against the grantor himself (as in the case

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of the Archbishops' options, which take effect under grants of the next avoidance made by the Bishops of the province), and that in these cases the right is exercised by a person in whom the politic character to which the right belonged, is not vested, I answer, that in those cases the right of the grantee is derived from the politic character of the grantor, who is capable of making the grant, and does, in fact, make it in his corporate capacity. Whereas an administrator can derive nothing from the politic character of the intestate, not being the representative of that character, but of the person only. And although a right to present on the next avoidance may be made a chattel by the act of a party, it does not follow that it shall become a chattel by operation of law. I am not aware that in any case the nature of a right is changed by the mere operation of the law working by itself without any act of the party. In the case of a natural person the nature of the right is not changed by giving the presentation to the executor. It is only a preference of one representative to another, the heir as well as the executor being a representative of the deceased. It may be asked, How, then, does the executor become entitled to rent due in the life of the prebendary? \*I think there is a manifest distinction between a rent and a presentation. The rent is intended for the maintenance of the prebendary; it can be enjoyed and used in his personal capacity only, and not in his politic capacity. It is assets in the hands of his executor, and nothing remains to be done to give or to accompany the present right to receive it; whereas a presentation is an act to be done, and must be accompanied by a right to do it.

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Thus far I have treated the question on principle only, and as if the law furnished no decision or authority in favour of my opinion. But the case of a Bishop dying after avoidance, and before presentation, does, as I think, furnish an authority. In that event the King is entitled to the presentation, Co. Litt. 388 a, as he is if the benefice become void during the vacancy of the see. This is, however, said to be by virtue of the prerogative; and so in one sense it is, but the matter is open to observations similar to those which I have already made on the case of the tenant *in capite*. It seems agreed that the King's right is by

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reason of the temporalities vested in him. A ward, relief, heriot, &c. passed to the executor, and were assets in his hands. All of these, however, were considered in law as chattels from the beginning, and came to the Bishop as chattels. Guardian in chivalry may grant, by deed or without deed, the wardship of the lands, or of the heir, or both, to another: Litt. s. 116. The reason for the power of assigning without deed given by Lord Coke, is, that the wardship is an original chattel during the minority, derived out of no freehold: Co. Litt. 85 a. If the turn had become a chattel, it must have ceased to be parcel of the temporalities, and must have vested in the Bishop in his personal or \*natural character, and so have passed to his executors, as the void turn in the present case is alleged to do. The inference to my mind, therefore, is, that the void turn in that case of a corporation sole has not been considered as a chattel, but as still remaining parcel of the inheritance and of the temporalities, and being thus vested in the Crown, the prerogative right would attach upon it in full force, and it would remain in the Crown notwithstanding restitution of the temporalities to the successor, such restitution not being accompanied with a special grant of the particular presentation. In Co. Litt. 388 a, the reason given against the right of the executor of the Bishop is, that nothing can be made of the presentment. It is obvious that this reason will apply with equal force to the executor of a natural person, and it seems, therefore, that this reason cannot have been the foundation of the rule, nor can I think that the rule is founded upon any other reason, except that of the presentation remaining and passing as part of the temporalities.

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I have hitherto purposely abstained from offering any argument from the presumed intention of the founder of the prebend. We are not judicially informed of the foundation of this particular prebend. Speaking of prebends generally, I believe their foundations to be various, some by the diocesan, some by the Crown, and some by private persons. But whoever may have been the founder, I conceive the object of the foundation to have been the maintenance of the prebendary, and that where an advowson formed part of the foundation, it was, at least, thought probable by the founder that the prebendary might become the incumbent,

and so derive his maintenance from the benefice, if it was not absolutely \*intended that he should do so. This opinion or intention of the founder will be best carried into effect by holding the void turn to be parcel of the inheritance, and so to pass to the successor, because the successor will be thereby enabled to present himself, which he cannot do if the turn passes to the executor of his predecessor. And if the annexation of the advowson to the prebend be considered as a trust intended to be vested in the prebendary, and to be executed only by the prebendary, this intention will certainly be defeated by allowing an executor to present. It is true, that before the statute 13 & 14 Car. II., a prebendary might have been a layman, and incapable of holding the benefice; but this was certainly contrary to general practice, and I apprehend, also, contrary to the general policy of the law. And although this fact may diminish the weight of observations derived from the ecclesiastical character of a prebendary, yet it does not affect his corporate character nor the nature of the supposed trust. My judgment is grounded upon that character, and it is upon consideration of the nature of the right, as vested in the politic and not in the natural person, and upon the want of any sufficient reason for the rule that has prevailed, and must still prevail, unless altered by an authority superior to that of this Court in the case of natural persons, that, I think, that rule ought not to be applied to the case of a corporation sole, and that the void turn must be considered as parcel of the inheritance passing to the successor, and not as a chattel severed from it and passing to the personal representative of the prebendary.

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*Judgment reversed.*

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The case was brought into this House by writ of error from the Court of King's Bench, and was argued in June, 1830, by the *Solicitor-General* (Sir E. Sugden) and Mr. Serjeant D'Oyley, for the plaintiffs in error, and by Mr. Patteson and Mr. Follett, for the defendant in error; when the following question was submitted to the Judges:

“An advowson belongs to a prebendary in right of his prebend,

[ 1 Cl. & Fin.  
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**MIREHOUSE** and the church becomes vacant, and the prebendary dies without  
**RENELL.** having presented; does the right of presentation belong to the personal representatives?"

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**BOSANQUET, J.** [for reasons which he gave at length, stated his opinion] that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

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**JAMES PARKE, J. :**

To the question which your Lordships have been pleased to refer to the Judges, I answer, that, in my opinion, the right of presentation belongs to the personal representatives of the deceased prebendary. The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

propose, therefore, to inquire, by reference to those sources from which we usually derive them, what the rules and maxims

of the common law upon this subject are; and it will be found that there is little difficulty in the inquiry, and none, as it seems to me, in their application to the facts under consideration.

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\*The decision of the present case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shewn to be unreasonable or inconvenient. First, that in every presentative benefice, the void turn is a personal right or interest, which is disannexed from the estate in the advowson, and vested in the person of the individual to whom the advowson then belongs. Secondly, that whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death, (with some exceptions, which are easily explained, and which have no bearing upon the present case,) vest, on the death of the owner, in his personal representatives.

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The first of these two propositions, I say, will be found to be supported by authority; for in every case which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn or right of presenting to a vacant presentative benefice is either expressly stated to be a personal right or interest, under a considerable variety of description, or the cases mentioned are capable of a satisfactory explanation upon that supposition only. It is true, that the great majority of the authorities to which I refer, relate to benefices in lay hands, but all do not; and there is no one case, text-book or *dictum*, of which I am aware, in which any intimation is conveyed that there is any exception to this general rule. Surely it is impossible to argue, with such a constant, uniform and unvarying course of precedent on one side, in all cases in which the subject has been in question, and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule; and if the absence of authority \*were not sufficient, it seems impossible to shew in what way the exception could have arisen.

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I have said that this rule exists in all presentative benefices, and I confine it to these; for donatives are a very different species of property, and are governed by different rules. This subject is

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most clearly explained, and all the authorities referred to, in the very learned judgment of my brother LITLEDALE, in the Court below (1) ; and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice, and the freehold in it, remain in the patron, together with the right to take the intermediate profits, until it is again granted out by him to a new incumbent, in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir. I do not propose to occupy your Lordships' time by citing all the authorities to prove that the void turn of a presentative benefice is a personal right or interest. They have been all referred to in the arguments at your Lordships' bar, and in those in the Court below. In some cases this interest is called a "chuse in action:" *Leach v. Babbington* (2) ; in some "a chattel," as by PERIAM, J., in the *Queen's, Fane's*, and the *Archbishop of Canterbury's* cases (3) ; in others, as in *Fitz. Nat. Brev. Quare Impedit*, 34 N., and 3 Keble, 152, "a chattel vested." A "personal chattel," *Vin. Abr. Executor*, z. 2, pl. 4, note. "A chattel vested and severed from the manor," *Fitz. Nat. Brev.* 93 P. In one it is called a "personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy ;" also, "a thing in right, power and authority ;" and also, a "chuse \*in action, and in effect, the fruit and execution of the advowson, and not any advowson," by six Justices, in *Stephens v. Wall* (4) ; in 3 Leon. 256, "a power to present, and an authority annexed to the person." In *Digby v. Fitch* (5), *WARBURTON, J.* said, "the presentment is the possession, in *quare impedit* ; as in rent, the reserving ; in common, the taking of the profits." In *Brooksby v. Wicham* (6), it is also compared to rent, and this analogy will be found to be the most perfect. The advowson is the estate, which descends, may be conveyed, is limited, and escheats as such ; the presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate at the time ; it accrues in the nature of a personal chattel, distinct and severed

(1) P. 141 above (7 B. & C. 145).

(2) Cro. Eliz. 811.

(3) 4 Leon. 109.

(4) Dyer, 283 a.

(5) Bro. & Golds. 167.

(6) 1 Leon. 167.

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from the inheritance; it belongs to him not as owner, but as an individual.

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These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor, in the event of the patron's death during vacancy. There are many others in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term: Fitz. Nat. Brev. Quare Impedit, 33 a; Brooke, Presentation Eglise, 22; and he would be equally entitled to the rents in arrear of an estate granted for the same term. A husband is entitled to present after his wife's death, on an avoidance during his wife's lifetime, of a church of which she had the advowson: Co. Litt. 120 a; Brooke Present. à l'Eglise, pl. 22; as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned (Dyer, 288 a) \*or released by one joint tenant to another (1 Leon. 167), as arrearages of rent are. If the patron be outlawed in trespass, the church being void, the King is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands. Brooke Presentation à l'Eglise, 22; Fitz. N. B. 34 Q. All these are cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson when in spiritual hands. In Fitz. N. B. 34 N., it is said, that "if a vicarage happen void, and before the parson present he is made a bishop, &c. yet he shall present unto this vicarage, for it was a chattel vested in him." All the authorities which I have cited are uniform (and many others might be adduced) to shew that the right of presentation is a personal right disconnected from the estate of the advowson, and belongs to the person of the owner; and the last applies to the case of a spiritual person, and is in point. But on the part of the successor it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported, and that all the others are anomalies; that in truth the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage, without any reason at all, though they have been too firmly established by authority

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to be now disturbed, but that the general rule still continues and ought to be maintained in the case of spiritual advowsons. Of course the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that while it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts \*the general rule, as will be found, without any authority for it; for there is no one case or *dictum* cited which makes any mention of such a general rule. But it is contended that it must be implied that there is such a rule, from four cases which lead to the inference that the next turn continues part of the advowson: one was where the incumbent was also patron, and died seised in fee of the advowson; the heir was held entitled to present, and it was said that this must be because the turn continued a part of the advowson: *Hall v. The Bishop of Winton* (1); but this case was decided, not on the ground of the next turn continuing parcel of the advowson, but expressly on the ground that the descent to the heir and the fall of the avoidance to the executor happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly consistent with it. Two other cases from which this inference was raised, were those referred to in Co. Litt. 388 a. A Bishop dies, a church being vacant in his life, and after his decease the King shall present, and not the executor or administrator: so also in the case of the death of a tenant by knight service *in capite*, with an advowson appendant, which has become void in his life, his heir within age, the King presents, and not the executor or administrator. And this is said to be another proof that the void turn is still a part of the advowson. But though the King omit to present till he restore to the Bishop his temporalities, or till the heir be of age and sue his livery and hath it, the King still has the right to present; and this shews that in neither case the void \*turn remains parcel of the advowson, and belongs to the person who is owner of it.

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For both these positions, Fitz. N. B. 33 N. O., is an authority. Besides, it is said in Co. Litt. 388 a, that if the land be holden of a common person, in that case the executor shall present; but if the void turn were still part of the advowson, why should not a common person as well as the King, when both take the advowson, exercise this right? It is quite clear, therefore, that as neither of these cases can be explained by the supposed rule, we must look for another explanation. Both are clearly referable to the King's prerogative, which entitles him in these special cases to this personal interest. It should be observed also, that Rolle's Abr. Presentation à l'Eglise, c. pl. 4, and Bro. Present. à l'Eglise, 10, which state that the King is entitled, both state that the Bishop's executors are not; which shews that these great lawyers thought the void turn was disannexed, and that the successor at all events had no right whatever. A fourth case, from which the inference of this continuance of the void turn as part of the advowson was deduced, was that of a conveyance by the Crown of an advowson, whilst the church was void, which, according to Fitz. N. B. 33, n., passes the void turn. Admitting that authority to be correct, and it is doubtful from what is said upon this subject in Dyer, 347 b, it is a question only as to the effect of the King's grant, and never could have arisen unless the void turn had been severed and distinct from the advowson. The case, in truth, amounts to no more than this, that the grant of an advowson which involves in it every present and future right of presentation, passes, in the case of the Crown, the next presentation to a void living, which the Crown can grant; Dyer, 283 a; though in the case of a subject it would not; for a subject cannot grant over such a \*personal right. None of those four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others,) in reality prove it at all, and all are capable of being satisfactorily explained upon another supposition. There is, therefore, as it appears to me, a great body of authority in favour of the position that the void turn is a personal right in all cases; and when the cases are investigated, a total absence of authority to the contrary. If it be conceded that this interest is of a personal nature, and dissevered from the advowson in all

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cases, it must be contended that in the case of a spiritual person, this personal interest or chattel will go by succession. But that is a violation of the established rule that a corporation sole cannot take a chattel by succession, whether in possession or action : *Fulwood's* case (1) ; and no authority can be cited to shew that this special chattel interest is an exception. I have shewn, therefore, that there is no authority for the alleged general rule that the void turn continues annexed to the advowson, and is not of a personal nature ; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor. Upon the hypothesis in favour of the successor, all the decided cases are anomalies ; upon that made by the personal representatives, that the right of presenting is in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right when in lay hands is analogous to rent, in the case of land, so it is when the advowson is in spiritual hands ; and as a parson or prebendary, who resigns, or his executor, when he dies, is clearly entitled to the arrearages of rent and profits which accrued before his resignation or \*death (Fitz. N. B. 122 D. ; 120 L. ; 19 Hen. VI., 44) ; so he or his personal representative ought to be entitled to the right of presenting, which fell during the same period. Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it while the prebend was in lay hands, which it clearly might have been before the Act of Uniformity, according to the case of *Bland v. Madox* (2) ? Is the void turn to be dissevered or not, according as the prebendary is a layman or ecclesiastic ? It is said that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it ; but not only is there no authority for this position, but many precedents are against it, in which Bishops and other ecclesiastical corporations sole have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your Lordships to the authorities ; they are collected in the reported cases in the Courts below. And indeed I am at a loss to see in what way

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(1) 4 Co. Rep. 64.

(2) Cro. Eliz. 79.

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the alleged difference, if there be any, between the qualities of an advowson in lay hands and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the Bishops in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands? or if they did wish it, what power had they to communicate them? They could no more alter the rules of law, \*and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. "Succession in a body politic, is inheritance in a body private:" *Fulwood's case* (1); and no grantor can, however much he may wish it, limit his estate against the rules of law. And supposing that there were instances in which a Bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if those difficulties are overcome, the alleged difference in the quality of lay and spiritual advowsons must at all events be confined to those very special cases, exclusive of all others.

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The next proposition which the authorities establish, is, that all personal rights and interests of the nature of property, and which are not extinguished by death, vest on the decease of the owner, (with some few exceptions,) in his personal representatives. The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a consequence of their representative character. Litt. s. 337, says that executors represent the person of their testator; so Yelverton, 103, is to the same purpose. He is in law the testator's assignee: Wentworth Off. Ex. 100. As to the estate

(1) 4 Co. Rep. 64.

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committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself ought: Sheppard's Touch. 401. Executors take therefore all the personal estate and \*interest of the testator, and are identified with him in respect to all personal property, but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for assets. It is a fallacy to suppose that they take nothing but what is valuable; and therefore do not take rights of presentation to void benefices: a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies. The 31 Edw. III. st. 1, c. 11, puts administrators who are the deputies of the ordinary on the same footing as executors (1). To this rule, that the personal representatives take all the personal rights of the deceased, of the nature of property, there are some exceptions, which the common law, in the case of private individuals or the King's prerogative right, has established. Chattels touching the realty, deer in a park, fish in a pond, evidences of heir-looms which go to the real representative, and the analogous case of the ornaments of a Bishop's chapel, which pass to the successor, are of the former description; the right of the Crown to the void turn, in the case of the tenant *in capite*, and the Bishop, stated by Coke, p. 388 a, are instances of the latter; and it is to be observed, that both those instances are put by him as exceptions to the general rule, that chattels, as well real as personal, shall go to the executors or administrators. None of the excepted cases have any bearing on this, and there is no mention anywhere made of an exception of the right in question when in spiritual hands; and it would violate the rule of law, as to succession by a corporation sole to chattels, if it did.

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My Lords, I must own that it appears to me to be quite clear, that if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present

(1) *Vide* also Shep. Touch. 401.

to the void living. These rules cannot be shewn to be contrary to sound reason and just policy. We are not inquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public interests. If such an alteration is proper, and it is not my province to inquire whether it is, it must be made by the Legislature. "What ground has a Judge," says Lord Keeper HENLEY, "to alter the law because he cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself?" At present the system is at all events uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed. The law of England, which has from the first treated advowsons as property, (the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration,) has not relied upon the person or character of the patron for the due exercise of the trust, but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony, and the selection of a fit clerk by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited and enjoyed, like other real property. For these reasons, I am of opinion that \*the right to present to the void turn passed to the personal representative of the deceased prebendary.

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GASELEE, J. :

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My humble answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

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PARK, J. :

When the case, out of which the question propounded by your Lordships for the opinion of his Majesty's Judges, first came before the Court of Common Pleas, I took infinite pains, by reading much in ecclesiastical history, by consulting our text writers, to satisfy my mind upon it (for as to decided cases, there are none); and after that, after having two very elaborate

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arguments at the bar, and long consultations with the then Lord Chief Justice of the Common Pleas, I came to the conclusion that Mrs. Rennell, as administratrix of her deceased husband, was not entitled to that which she claimed ; and in giving which opinion (1), I am happy to say I concurred with Lord Chief Justice BEST, (now one of your Lordships' House,) and Mr. Justice BURROUGH, a man who for legal knowledge, and sound and correct understanding, was of no ordinary kind. To err in judgment with two such Judges, if err we did, can be no disgrace to any man. When this case was removed from the Common Pleas into the King's Bench, by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below, against the opinion of Lord TENTERDEN, the Chief Justice ; so here again the Judges were three to one against the judgment : thus four Judges were opposed to four ; and, therefore, we need not wonder that this case has found its way into your Lordships' House. I have again heard this case argued with great learning and ability at this Bar ; I have considered \*every argument, and studied the judgments of my different learned brethren, and the authorities they have quoted ; and though I do not deny that my mind has now and then fluctuated, (which great learning and great ingenuity at the Bar will frequently occasion), I have arrived at the same conclusion I did in the Common Pleas ; namely, that the administratrix of Mr. Rennell is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. Rennell, as prebendary, in right of his prebend in the church of Salisbury ; and that is the answer I propose to give to your Lordships' question. Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had anything passed, either in the Court of King's Bench or in this House, which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake, and to retract my judgment. I have done so on two other occasions in this House, and shall never be ashamed to make such an avowal ; for none but a weak, nay a wicked mind, will persist in error, if the

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(1) *Sic.*

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understanding and more mature reflection convince a man that he had before formed a wrong judgment. It is admitted, then, that it is not necessary for your Lordships to decide, upon this record, who has the right of presentation to the living in question; the point is, whether Mrs. Rennell, as administratrix to her deceased husband, (which must be in his natural capacity,) has established her claim to a living, the advowson of which belonged to her deceased husband, in right of his prebend of South Grantham. Not that upon that question I have not a clear opinion; for I do not think it goes to the Crown, as it was surmised it did, but I think it goes to his successor in the stall or \*prebend in the church of Salisbury. A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case, but it is a point upon which there is no difference of opinion; namely, that in the case of lay patronage, in the events which have happened, the patron dying after the actual vacancy, the personal representative and not the heir would have been entitled to the presentation; because in merely lay patronage, the church, having become vacant in the lifetime of the last possessor, thereby became a chattel, and went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a mere question between the different representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions and of a practice long known; although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord COKE, in his first Instit. 388 a, says that such a turn is not assets, and therefore nothing can be made of it for the payment of debts; therefore the rule between heir and executor cannot depend upon considerations of that sort. But I agree with Lord TENTERDEN that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned

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brethren in any Court, who have judicially given any opinion, nor from any industry displayed at the Bar in the Courts below or in this House, nor from my own laborious reading and research upon this subject, that in \*any Court in England has such a case in specie ever been decided. The question is, in my view, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt ; and that ecclesiastical patrons thought it clear one way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up, no spiritual person ever imagined that those rights which a man held *jure ecclesie* merely, could be exercised by others after his death ; the words of the grant to such a person being, “ We duly and canonically invest you ” (not your executor, &c.) “ in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges and appurtenances thereunto belonging ; ” otherwise one cannot but think in 500 or 600 years such a claim would have been contested, and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of England than that between the lay and the spiritual function and character ; even the variety of cases and statutes quoted by my learned brothers who have gone before me, and which I shall not fatigue the House by wading through, establish the distinction. Certain personal rights belong to one of these characters, which do not belong to the other. The transmission of church property also stands under very different considerations from the transmission of lay property : for instance, a person seised of a freehold right is said to be seised in his demesne as of fee ; a clergyman, as in this declaration, is said to be seised in his demesne as of fee in right of his said prebend or canonry. I cannot deny that many of the evils and absurdities which I contemplate \*by giving effect to Mrs. Rennell’s claim will also arise in lay patronage, because it must be admitted that by giving the presentation to the personal representative of a lay patron, it may fall to a very inferior person to present ; but this evil arises out of the unfortunate situation in which lay patronage

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stands, but which I contend ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his natural, the other in a politic or corporate character. What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this, that it arose in the infancy of society, and under these circumstances, that though the appointment of fit persons to officiate throughout a diocese was originally in the Bishop, yet when lords of manors, and other great men of old, were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the Bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. “*Si quis ecclesiam cum assensu diocesani construxit, ex eo jus patronatus acquiritur;*” and hence have followed all the consequences of a mere lay possession, or property; chattels, where chattels, going to the executor; the rights of the heir, to the heir, in cases where by the common law the rights of the heir were paramount to those of the personal representative. But still the question recurs, do those rules apply to the spiritual patron; and can the rights and property which belong to his politic character be dealt with as if he were a private person? Of this there can be no doubt, that in our law now, and I hope they ever will be, lay and \*spiritual patronage are upon a very different footing. Bishop Gibson, in his Codex, p. 757, decisively marks the distinction. That very learned prelate says, and his authority upon subjects of this nature has always been considered as entitled to great respect, “The right or property which the patron has in an advowson will not warrant a plea, as it is in temporal property” (of course therefore the Bishop is contrasting it with an advowson in spiritual hands) “that he is seised in *dominio suo ut de feodo*, but only *de feodo*. The reason of which is given by Lord Coke, Inst. 17 a, because that inheritance (viz. an advowson) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can anything be received of the same for defraying of charges;

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and in the case of *John London v. The Church of Southwell* (1), where the words of the lease were, 'commodities, emoluments, profits and advantages to the prebend belonging,' it was adjudged that the advowson did not pass by the said words; because, said the Court, all the words used implied things gainful, which is contrary to the nature of an advowson regularly." Why is this so? I say it is so, because an advowson in the hands of a sole corporator, a churchman, is not a matter of profit, but of naked trust merely; and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust in *jure ecclesie*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a member of the church could he have a right to dispose. Mr. Rennell, therefore, had only a right as member of the church of Salisbury, and the moment he expired all his rights as \*a member of that church ceased. Suppose, instead of his death, he had resigned his prebend of South Grantham, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as fruit fallen during his holding the prebend? Am I right in stating to your Lordships that this is a matter of trust only; for upon that much of the argument has turned? I wish to found myself again upon the authority of Bishop Gibson on this point, in pages 757 and 758, founding himself on the authority of Lord Coke, even in cases of lay patrons: "Guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it, and by the law he can meddle with nothing he cannot account for; which said doctrine, and the plain tendency thereof, are exactly agreeable not only to the nature of advowsons, which are merely a trust vested in the hands of the patrons by consent of the Bishop, for the good of the church and of religion, but also to the express letter of the canon law; the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest.*" In another place, the Bishop says they are mere trusts for the benefit of men's souls. If this be so, in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the

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churches are full, may have grown, am I not right in stating to your Lordships that the greatest difference exists between lay and ecclesiastical; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a mere trust, to be exercised by the patron for the benefit of the church, to the due discharge of which he alone is to look, which \*he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment? It may appear to your Lordships a low and unfit argument to state to this House; but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit. Suppose a prebendary died insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker or other inferior tradesman, being a creditor, took out administration, must such person present? Is such a person capable of forming a correct judgment of a person fit for the cure of souls? And yet I defy the ingenuity of man to get out of the dilemma; for if Mrs. Rennell is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequence would follow in lay patronage; but I am quite sure, till compelled by the judgment of your Lordships' House, I cannot, consistently with my feelings to your Lordships nor to myself, declaring a judicial opinion, advise that such lamentable consequences should be carried one step farther. That the presentation now under consideration is not assets of value is quite clear; it may be a chattel, but, in the hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence in our law books during the whole period of our ascertained law of England, upon \*this precise point; although circumstances similar to the present must have

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existed many times. And this, to me, is a strong convincing proof that till these days of novelty no such idea was ever entertained upon this question ; and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing, I think, can be put in a stronger light, than was done by my learned brother, BURROUGH, when this case was before the Court of Common Pleas. The allegations of this declaration are, that the late prebendary, in his lifetime, and at his death, was seised of the prebend or canonry founded in the church of Sarum, with its appurtenances, to which prebend the advowson of the rectory of the said parish church of Welby belongs, in his demesne as of fee, in right of the said prebend or canonry. By the law of England, a prebendary or canon is an ecclesiastical sole corporation ; as such, he can have no heir, he can have no personal representative ; as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where then must they go ? To his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects ; in one respect, as a member of the corporation of dean and canons, he is one of the chapter having *sedem in ecclesie et vocem in capitulo* ; and he is a corporator sole as prebendary. In every relation in which he stands to the church he is a corporator. I do not presume to state to your Lordships anything particular respecting the constitution of this canonry of South Grantham, though much pains has been taken respecting it by Lord Chief Justice BEST and Mr. Justice BURROUGH, in the Court below ; because,

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though there be no doubt of the authenticity of \*the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs, for by a canon he has no heirs ; it must therefore mean, to him and his successors. We find in all our law books the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said the prebend

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is vested in the spiritual incumbent; but if we could suppose it vested in him in his natural capacity, on his death it might descend to his heir, which cannot be. The law has therefore wisely ordained that the spiritual person, as such, shall never die, any more than the King, by making him and his successors a corporation; by which means all rights are preserved entire to the successor; for the present incumbent of a spiritual charge, and his predecessor who lived centuries ago, are in law one and the same person; but if the personal representative, or even the natural heir, were to intervene, the succession would be broken: 1 Blacks. Com. 470. The position of Lord TENTERDEN, agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view: "It is clear," says his Lordship, "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented; and this will not be conformable to the general rights of an administratrix, which are those only that belonged to the person or personal property of the intestate. \*She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will in the present instance be exercised, not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in fact held it in his natural capacity. A decision to this effect will be contrary to the nature of the right." Some stress was laid, in arguing this case upon the stat. of 28 Hen. VIII. c. 11 (1), and I own I was at first impressed with the argument arising upon it. But upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the Reformation, and it appears that the then heads of the

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(1) 21 Hen. VIII. c. 11 in the original report.

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Church, following in that respect the example of the see of Rome, exercised, or endeavoured to keep in their hands the temporalities of the Church, which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time, for their private benefit, to the great ruin and impoverishment of persons appointed to livings; the statute deprived them of that right, and gave the benefit to the new incumbent, from the death of the last, and to the executors of such new incumbent, if he should happen to die before he realized those interests which the statute thus gave to him. Much stress has also been laid, both at your Lordships' bar and at the bar of the Courts below, on the options of the Archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But I answer, that they are anomalies \*in the law, and the exception proves the general rule. They were originally, Mr. Justice Blackstone thinks, derived from the legatine power formerly annexed by the Popes to the metropolitan of Canterbury, and that right has been continued to the Archbishops in their respective provinces of Canterbury and York, even after the power of the Popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to shew that the rights of lay and ecclesiastical persons stand upon a totally different foundation; and that the law, attaching as it may upon property of this description, in the hands of a lay person, does not attach upon the same species of property in the hands of one who holds *jure ecclesie*. The case of *Repington v. The Governors of Tamworth School* (1), has been much pressed; but it is difficult to ascertain the grounds of that judgment. It was the case of a donative, and Lord TENTERDEN thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and therefore not to be extended. A donative is, however, of a very peculiar nature, and therefore any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice Blackstone, vol. 2, p. 24, speaking of donatives, considers them as exceptions; for he says, "These exceptions to general rules and common right are ever looked upon by the law in an

(1) 2 Wilson, 150.

unfavourable view, and construed as strictly as possible." If, therefore, the patron of a donative, in whom such peculiar right resides, does once give up that right, by presenting his clerk to the Bishop, and procuring institution and induction, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, \*and will therefore reduce it to the standard of other ecclesiastical livings. The ground of my opinion is, that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust to be exercised by him or them in the spiritual character, which he cannot, consistently with his high duty, if he be a sole corporation, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds *jure ecclesiae*, and in that right only; if he had it not in that right he could not have it at all; and when he dies, all his rights, powers and privileges derived from the church absolutely cease, as if he had never existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. Burn, in his 2nd vol. 7th edit. p. 92, title Dean and Chapters, observes (Dr. Godolphin having said that after the death of a prebendary the dean and chapter shall have the profits): "But by statute 28 Hen. VIII. c. 11, the profits of a prebend during the vacation shall go to the successor." Dr. Burn reconciles this apparent contradiction thus, which bears on the discussion now before your Lordships: "the issues of those possessions which he has in common with the rest of the chapter, (that is, a corporation aggregate,) shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions which he has in his separate capacity as a sole corporation of himself, shall be and enure to his successor." Dr. Burn seems well supported in this distinction, by the case of *Young v. Lynch* (1). Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice \*in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonged to the intestate as a sole corporation merely;

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(1) Sayer's Rep. p. 84.

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although Dr. Burn more justly says in that case, "it would go to the surviving members of the chapter ; in the other, to the successor." When Bishop Gibson says advowsons may be granted by deed or will, &c., he is evidently speaking of lay patronage only ; for he adds, " This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches ; all these being restrained, (as to Bishops, by stat. of 1 Eliz., and the rest by 13 Eliz.,) from making any grants but of things corporeal, of which a rent or annual profit may be reserved ; and of that sort, advowsons and next avoidances, which are incorporeal, and lie in grant, cannot be." This distinction between laity and clergy pervades every page of our ecclesiastical history ; and those well versed in the history of our venerable church will immediately recognize the justice and accuracy of those principles I have been endeavouring to establish.

It is well known that in the early periods of the church history of this country the *parochia* or parish was the episcopal district. The Bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the Bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works of piety and charity. At this time and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But in order to supply the inconvenience

[ \*579 ] \*of distance from the mother church, the Bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments, and these missionaries returned to give to the Bishop a due account of their labours and success. As the wants of society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen (where they had the patronage given them as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shewn), some by the Bishops to the prebendal body at large, some to one particular member of the body ; all

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which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus these churches which were not in lay hands became prebendal ; and the supply of the duty was left to the aggregate corporation, where the perpetual advowson was in the whole community of the dean and chapter, or to that sole corporation, or single canon, or prebendary, who was to have his prebend or exhibition from it. In progress of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the Bishop obliged his clergy who had such advowsons to retain fit and able capellans, vicars or curates (for these are all nearly of the same import), with a competent salary. This failing, the Bishop again interfered, and obliged the clergy (that is, the chapter, or that single prebendary, in whom the perpetual advowsons in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesie*, was vested,) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual, than others \*had upon their lay patrons, with a competent maintenance to be assigned by the Bishop.

[ \*580 ]

Much of this information may be inferred from the stat. 15 Ric. II. c. 6, and the 4 Hen. IV. c. 12.

I have not thought it necessary, in giving this detail to your Lordships, to refer to authorities, but what I have advanced will be found as the early history of our church, in various books well worthy the attention of the curious : such as Spelman *De non temerandis Ecclesiis* ; Bish. Kennet on *Impropriations* ; and Burn, title “ *Appropriation*.” But I have presumed to trouble your Lordships with this short history of the Church, because it seems to me to prove incontrovertibly, that what is thus vested in the churches for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole corporator. And it will be found, that what is said of the church at large, is no less true of the church of Salisbury, as was luminously shewn by Lord WYNFORD and Mr. Justice BURROUGH in the Court below ; and much is to be found in 3 Dugd. Mon. 371. Thus then an ecclesiastical person, during his incumbency, is entitled to all the profits that

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may fall of a chattel nature: but when a living falls vacant to which he has a presentation in right of his church, as it is not a matter of profit, he merely presents *quasi* incumbent.

[ \*581 ]

I have shewn to your Lordships that the living, in the present case, was probably endowed out of the prebend, or the advowson attached to the prebend of South Grantham; in either case, the prebendary, as a sole corporator for the time being, has the right of presentation, and when there is an avoidance he may present in right of his church: he presents as a trustee; \*the trust is personal, without profit, and cannot be transmitted: how then can a private personal representative of a deceased prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a chose in action, out of which to pay the debts of testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon, or as it were, become vested in, the testator or intestate? The trust has indeed devolved upon him, but not in his own right, but, as the declaration truly states, in right of his prebend: the presentation is in him, not for his own use or benefit, but for the use and benefit of the Church, confided to his spiritual not to his lay hands, for the dignity and ornament of the Church; a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement of the interests of religion; a duty which his personal representative, in his natural capacity, cannot in law be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon this great, and as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion I have done without most anxious consideration and deep research. The result, then, of my opinion is this, that whatever is attached to a spiritual sole politic body, sinks with the death or resignation of the party who possesses that right.

BAYLEY, B.:

As the opinion I delivered when this case was before the King's

Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be \*obliged to detain your Lordships at any considerable length.

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\* \* \* \* \*

Upon the whole, therefore, I am of opinion that the general rule is, that if a church becomes vacant and the patron diē, the right to present devolves upon his executor ; that this is the rule also when a prebendary in right of his church is patron, because until the statute \*of Car. II., (13 & 14 Car. II. c. 4, s. 14) it was not necessary a prebendary should be a spiritual person, and because in the case of spiritual persons their right to present to churches is temporal, not spiritual, inasmuch as they only grant it away when a vacancy occurs, as they may their other temporal possessions ; and that the excepted case of a Bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a Bishop is referable to the prerogative of the Crown, which enables the Crown to take a chattel in succession, and to the relation in which the Crown stands to a Bishop, the Bishop being tenant *in capite* to the Crown, not to the spiritual character of Bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that, in the case that question propounds, the right of presenting belongs to the executors of the prebendary.

[ \*588 ]

BOLLAND, B., after stating the question [and arguing it at some length, gave his opinion] that if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation does not belong to the personal representative of the deceased prebendary.

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LITLEDALE, J. simply expressed his concurrence with the majority of the Judges, intimating that \*he saw no reason for altering the opinion which he had given in the Court below.

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TINDAL, Ch. J. :

My Lords, upon the best consideration I can bring to this case, I have come to the conclusion, that the right of presentation

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belongs to the personal representative of the late prebendary ; but at the same time I am ready to admit it is after considerable doubt upon the question which has been submitted to us by your Lordships. If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider upon general principles what might be most fitting and expedient, in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion, that the right to fill up the turn which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative. But neither upon the abstract question proposed by your Lordships nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies. And as to any considerations derived from general expediency, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and within the authority of various decided cases. It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been \*expressed by the majority of his Majesty's Judges ; thinking it a safer course upon this occasion, as I find has been the opinion of other Judges from the earliest periods of the law, to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just. I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir or to the next owner of the advowson. Indeed so clearly is this principle

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recognized, that all the books concur in calling this vacant turn a chattel vested in the testator, (Fitz. N. B. 33, P., 34, N.; 4 Leon. 109). In the case in Fitzherbert's N. B. 33, P., it is stated, "If a man be seised in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was a chattel vested and severed from the manor." If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? and if once severed, it is difficult to assign any legal principle upon which it can be reunited. Unless therefore some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but that the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal representative. \*It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion. In Fitz. N. B. 34, N., is found this case, "If a vicarage happen void, and, before the parson present, he is made a Bishop, &c., yet he shall present unto this vicarage, because a chattel vested in him." The authority referred to is 24 Edw. III., 26; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in Fitz. Abr. Quare Impedit, 22. In that case, as in the present, the patron was seised *in jure ecclesiæ*; and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him, did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent; that if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint, notwithstanding his cesser of the prebend, on what principle shall his death be held to reunite the presentation with the prebend from which it

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has once been severed? The case in 2 Rolle's Abr. 346, f., pl. 4, shews the law where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed: "If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage shall present." So that, although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure \*ecclesiæ*, yet it shall not devolve to the successor; but if it happen before the vacancy, the former rector shall still appoint; if during the vacancy, the patron. Both which cases are strong to shew there is no indissoluble union between the right of presentation and the prebend itself. To which may be added the case stated in Fitz. N. B. 38, P., "That if a Bishop die, seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the King shall present unto the same, by reason of the temporalities, and not the Bishop's executor." The reason is, that the King takes the temporalities by reason of his prerogative, and the turn being once vested in him, cannot be got out of him but by matter of record. Now, although the express point adjudged by that case does not apply here, because there is no prerogative in this case; yet it furnishes an observation which appears not unimportant. Fitzherbert puts this case in apposition with that which had immediately preceded it, namely the case in which he has stated, "The executor shall present and not the heir, because it was a chattel vested and severed from the manor," &c. He then puts the case of the Bishop, and the inference to be drawn is, that, but for the prerogative, the executor would have presented; otherwise he would not have said, the King shall present, and not the Bishop's executor: the observation would have been, the King shall present, and not the successor. If this is a just inference, the authority of the case last referred to would go the length of deciding the present: if the executor of the Bishop would be entitled to present to the turn which fell vacant in the Bishop's life, and which belonged to the Bishop *jure ecclesiæ*, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative

exists, \*that the executor has the right to present to the vacant benefice.

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The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further argument against the notion, that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the presentation has given it. Such grants are of very frequent occurrence in the old Books of Entries containing pleadings in *quare impedit*, and it is impossible to conceive they should be found there unless the practice was common, or that they could have been put upon the record, if such grants were against law; inasmuch as the plaintiff deriving title under them, would only be shewing the insufficiency of his right to sue.

Again, the universal practice of grants made to the Archbishops by Bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but the law allows it to be transferred to another. It may indeed be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore the ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so; still how can we reconcile to that principle, the right which the Archbishop has to devise these options to any one he chooses to select? And that such power exists, appears from the case of *Potter v. Chapman* (1), where the only question before Lord Hardwicke \*is made upon the propriety of the particular appointment by the trustees under the Archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If then the Bishop may sever and disannex from his bishopric a right of presentation, to which he becomes entitled *jure episcopatus*, and not otherwise; still further, if the Archbishop to whom the grant hath been made, may bequeath it to a stranger by his will, or what is an identical

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(1) Amb. 98.

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proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in the Doctor and Student would appear to be correct, where no distinction whatever is introduced between presentations made by laymen, or presentations made by ecclesiastical corporations, between advowsons appendant to manors, or advowsons appendant to offices of the Church, but it is laid down generally thus (see Dial. 2, c. 26): "It is holden in the laws of the realm that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be." And again, "the goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be." Now if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to shew, if it passes by grant, is devisable by will, or in case of no bequest, \*goes to the personal representative, then indeed is the passage above cited a strong proof of the opinion of learned men, at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living cannot devolve upon the successor and go along with the prebend, that a prebendary is a corporation sole; and that by law, a corporation sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (Co. Litt. 9 a, 46 b; Hob. 64.) If this be the law, how can this vacant turn, once severed from the prebend, become re-united, or descend with the corporation sole? That such would be the case as to some of the profits of the prebendal stall, where they fell due in the lifetime of the predecessor, appears clear. Rent which accrued due in his

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lifetime would go to his executor: for the stat. 28 Hen. VIII. c. 11, gives to the successor the rent only which accrues during the vacancy; leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a chose in action, or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must leave upon the reasons and authorities which I have before given. The case of the donative, cited from 2 Wils. Rep., does indeed furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to \*see the grounds upon which that judgment proceeded, in so short and unsatisfactory a report, with such a degree of clearness as to place it in competition with the other principles to which I have referred, and which lead my mind to a different conclusion. I have therefore felt myself bound, by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your Lordships what is most expedient, but what the law at present is, upon the question submitted to us.

[ \*603 ]

LORD LYNDHURST:

1833.  
Aug. 19.

My Lords, I move for your Lordships' judgment in the case of *Mirehouse v. Rennell*. It was a case of a writ of error from the Court of King's Bench; that Court reversed a previous judgment on a *quare impedit* in the Court of Common Pleas. When the case came here, it was argued with great ability and learning in the presence of the Judges; they took time to consider the subject; there was ultimately a difference of opinion, six of them pronounced judgment in affirmance of the judgment of the Court of King's Bench, and two of them were of an opposite opinion. I have to move your Lordships, that the

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judgment of the Court of King's Bench be affirmed; not on the ground of the majority of the Judges being of opinion in favour of that judgment, but because I think it is a sound and correct opinion. It is not necessary on this occasion, after the many discussions the subject has undergone, and after the correct reports of the different proceedings in the various stages of the case, to enter into a detailed statement of these proceedings:

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\*I shall briefly state the grounds on which I shall move that the judgment of the Court of King's Bench be affirmed. The facts are shortly these: Mr. Rennell was a prebendary of Salisbury cathedral; to his prebend was annexed the rectory, or the advowson of the rectory, of the parish church of Welby, in Lincolnshire. The incumbent died during the lifetime of Mr. Rennell, and before Mr. Rennell had appointed a successor he himself died. The question is, whether the right of presenting to the vacant benefice belongs to the personal representative of Mr. Rennell, or to his successor in the prebend. This is the question for consideration. The advowson is the right of presenting to the benefice; it is an incorporeal right, and is subject to all the incidents of that species of property; it may be granted in tail, and demised for life or for a term of years. These different interests can be carved out of the fee. As long as the church was filled, the right of presentation was annexed to the advowson, and it passed with it into whose hands soever the advowson passed; the grant of the advowson carried the right to present. This continues only as long as the church is filled; if the church is vacant, in that case the right of presentation is a fruit fallen, a pure chattel; it is a chose in action, and severed from the advowson. The right of presentation, when so severed, passes like the arrears of rent, not to the heir (I am now considering the case of a natural person), but, according to all the authorities, to the personal representatives of the last owner of the advowson. If the advowson is granted for a term, and the benefice fall vacant, and the benefice is not filled up when the term expires, the lessee still has the right of presentation, on the ground of its being severed from the advowson. If a wife is entitled to an advowson, and the benefice is vacant, and she dies before presentation, \*the husband has the right to present,

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because it was severed from the advowson. I apprehend that there is no doubt respecting this principle which I have now stated. But it was argued at the Bar, and also in the Court below, on the authority of certain cases to which I will refer, that in reality there was no severance. The authorities cited on that point appeared to me to be mere exceptions to the general rule, or, if not, they tended to establish exceptions. There was one case, of a tenant *in capite* of the Crown, who held a manor to which an advowson was annexed: the incumbent died; the tenant of the manor died, his heir not of age; under these circumstances it was decided that the right to present did not pass to the personal representatives, but belonged to the Crown. It appears to me that this is an exception to the general rule, and is founded in the prerogative of the Crown; and the exception appeared from this, that if it had applied to a common person, the Court would not have decided so, but would have held that the right passed to the personal representative; and it also appeared, for another reason, that it was founded in the prerogative: in that case the heir, being an infant, might, when he came of age, sue out his livery, and if the King had not already presented, then he, and not the King, would, notwithstanding the circumstances, be entitled to present; which shews that the right was not severed from the advowson. In like manner, if the party entitled to the advowson, the benefice being vacant, granted the advowson, the right of the next presentation did not pass, because of the severance from the advowson. There was cited another case; it was that of a Bishop entitled to an advowson in right of his bishoprick. The incumbent dies, and the Bishop dies before presentation; the \*Crown has the right to present, not the personal representative of the Bishop. That is another of those cases which are exceptions to the general rule, and are founded on the prerogative of the Crown. There was another case of this description: the incumbent died, the patron died during the vacancy of the benefice; and the question was, whether the personal representative of the patron had the next presentation, or the heir; which question was decided in favour of the heir, on the ground that the heir's title was superior. These are the cases which were relied on for the

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purpose of combating the general position of law, that on the death of the incumbent, the right of filling the church was severed from the advowson; and the case is made out in respect of a natural person. The next question then is, how it applies to a sole corporation? I will first consider it disencumbered of its ecclesiastical character. A prebendary is a sole corporation. What is the difference between a sole corporation and a single natural person? I cannot distinguish the case of a sole corporation from that of a natural person. What would be the difference between them as to the right of succession? Respecting real estate, it would pass to the heir, or the successor; respecting personal estate, (I consider it as an individual right,) it would pass, as in the case of a natural person, to the personal representatives, executors or administrators. Arrears of rent, relief, and all fruits of this description, which are severed from the realty, become attached to the person, and pass to the personal representative as a chattel interest, and which cannot attach to the successor, and that was decided in *Coke*. If so, then this right to present becomes a chattel passed to the personal representative, and could not go to a successor. I consider the case as clear in point of \*law, with reference to a sole corporation, as to a natural person. The doctrine is the same as to a prebend. A prebend implied no cure of souls attached to it. It was unnecessary, before the Statute of Uniformity (1), that a prebendary should be an ecclesiastic. Prebends were often granted to laymen, and there was no alteration made by the Statute of Uniformity, except that the office was to be filled by an ecclesiastic: it made no difference because it was so filled. It was not because it was held by an ecclesiastic that the presentation must devolve on his successor: in the case of an Archbishop's option, it did not pass to the successor, but to the personal representative. The case of these options seems to me to furnish a strong analogy to the present case, and the same arguments that apply here against allowing ecclesiastical patronage to be vested in any but ecclesiastical hands, apply with equal force to the case of Archbishops' options: yet upon the mode of their passing no doubt whatever is entertained.

[ \*607 ]

(1) 13 & 14 Car. II. c. 4.

It was said, in the course of the argument, that much inconvenience would arise from this decision, and that if carried into effect, the personal representative might be a female or a mere tradesman, who would thus have a right to present to a valuable and important living or benefice of this description. This must be the case, as the law exists at present; but your Lordships must not allow such considerations to influence your judgments: you must decide according to the law, even though the law is inconvenient. You must not suit your judgments to meet the opinions of what is convenient; the alteration, if any is necessary, must come from the Legislature. On these grounds and on this view of the case, I humbly submit that the judgment of the Court of King's Bench be affirmed.

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LORD WYNFORD:

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I have had an interview with Lord TENTERDEN on the subject of this case, since it came into this House, and that noble and learned Lord still continues of opinion that the judgment of the Court of Common Pleas was right. I confess that my opinion too is unchanged. If this were lay patronage, I should be ready to admit that the right of presentation was severed, that it was a fruit fallen, and ought to go to the executor or administrator. But in my opinion there is a wide distinction between ecclesiastical and lay patronage. These two rights of patronage are placed on perfectly different grounds; one being, as Lord KENYON has truly said, connected with an interest, while it is impossible to consider the other in the same view. There has been a point put in the Court below, which to me seems unanswerable. It is this, that in this case the lady is the administratrix of the lay property of her deceased husband, but not of the possessions of the church of Salisbury. The patronage now under discussion has no connection with the person of the individual himself, except so far as he stands in the character of a part of the church in whom the patronage was really vested. Lord COKE says, that where there was no common law, nor any statute nor custom against it, the ecclesiastical law would prevail (1). Now that was the case here, and this benefice fallen belongs to the

(1) 1 Inst. 344 a.

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church, and so *pertinet ad successorem*. I ask your Lordships whether it is proper that patronage of this sort should be liable to be disposed of for the benefit of creditors? In the present instance, I can say from my personal knowledge of the family, that it might have been safely left to the disposition of the administratrix; \*but when your Lordships shall decide in her favour, that decision will govern other cases of a similar nature when the advowson may fall into bad hands, and the interests of the church may be made to suffer materially. Under these circumstances, I think it would be better if your Lordships could give the advowson to the successor; and if you do not consider yourselves bound to do otherwise, I think you should so give it. My noble and learned friend has alluded to the case of Archbishops' options. I know that in some cases in the courts of equity, these options have been treated as property, and trusts relating to them have been recognized, but in all those cases it was taken for granted that Archbishops' options were legal. We all know whence these options are said to have come, namely, from the Pope; but the first recorded instance of them that I can find, is in the reign of Henry VIII., at a time when the papal power in this country, both ordinary and extraordinary, had been overthrown. The first instance to be found in the books of the assignment to the Archbishop of a particular benefice, is in the case of Archbishop Cranmer. I have good reason, therefore, for doubting, whether they can be said to be established here by common law, and I hope sincerely that these options may soon be brought before this House, and that the law respecting them may be settled by Act of Parliament. I am bound, however, to say that Archbishop Cranmer, by the use he made of these options, almost justified the creation of them, for in every instance he handed them over to the successor. I shall not oppose the motion of my noble and learned friend, although I must say, that notwithstanding the great respect I entertain for the six learned Judges who have delivered their

[ \*609 ]

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observation I shall consent to the judgment which has been moved by my noble and learned friend.

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*The judgment of the Court of King's Bench was accordingly affirmed.*

APPEAL FROM THE COURT OF CHANCERY.

NICOL v. VAUGHAN.

(1 Clark & Finnelly, 495—526; S. C. 7 Bligh (N. S.) 395.)

1833.  
June 17, 18.  
August 27.

[SEE the reports of two previous appeals in this case, one taken from 5 Bligh (N. S.) 505, the other from 1 Cl. & Fin. 49, reported together in 35 R. R., at pp. 60 and 67, and followed by a short report of this appeal. See 35 R. R., p. 75.]

APPEAL FROM THE COURT OF CHANCERY.

LOGAN v. WIENHOLT.

(1 Clark & Finnelly, 611—635; S. C. 7 Bligh (N. S.) 1.)

1832.  
March.  
July 7.  
1833.  
April 4.  
Lord  
BROUGHAM,  
L.C.  
Lord  
PLUNKETT.  
[ 611 ]

A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever: Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond.

THE respondent, Mary Wienholt, filed her bill in the Court of Chancery, in the month of April, 1818, against the appellants and others, stating, amongst other things, that in the year 1772 a marriage was agreed on between John Wienholt, of St. Helen's, London, merchant, and Sarah Jopson, of Cannon Street, London, spinster, both since deceased; and that the said Sarah Jopson was the niece of Daniel Birkett the elder, also since deceased;

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[ \*612 ]

and that, in consideration of the intended marriage, the said Daniel Birkett agreed to secure to her and the issue of the marriage, if Sarah Jopson or any issue of that marriage should survive him, the sum of 1,000*l.*, in case he should leave a wife or any lawful issue; and in case he should die unmarried or without lawful issue, then the \*sum of 2,000*l.*, and such further share of his property as should be equal to the largest devise or bequest that he should make to his next of kin or any other person. And the said agreement was reduced into writing, and prepared in the form of a condition to a bond, and such bond was executed on the 8th April, 1772, and thereby the said Daniel Birkett bound himself, his heirs, executors and administrators, in the penal sum of 4,000*l.*, for the due performance of the agreement contained in the condition of the said bond. That condition—after reciting the marriage agreed on, and that Daniel Birkett approved of the same, and in consideration thereof and of his natural love and affection for his niece, had determined to make provision for her and for the issue of the intended marriage,—was declared to be, “that if the said intended marriage should take effect, and the said Sarah or any issue of the said intended marriage should survive the obligor, the heirs, executors and administrators of the obligor should in that case, and also in case the obligor should happen to die unmarried and without any lawful issue, well and truly pay or cause to be paid unto Thomas Norman and John Greaves, their executors or administrators, the full sum of 2,000*l.* of lawful money of Great Britain, within the space of 12 calendar months next after the decease of him, the obligor; but in case the obligor should happen to depart this life, leaving a wife, or any lawful issue by him begotten, living at his decease, then the sum of 1,000*l.* only; the said 2,000*l.* or 1,000*l.*, as the case might happen, to be paid to the said Thomas Norman and John Greaves, their executors or administrators, within 12 calendar months next after the decease of the obligor, to be by them, their executors or administrators, applied upon the trusts following, (that is \*to say): that the said Thomas Norman and John Greaves, or the survivor of them, or the executors or administrators of such survivor, should lay out the said sum of 2,000*l.*

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or 1,000*l.*, as the case should happen to be, in some of the public stocks or government securities, in trust for the said Sarah, and to permit and suffer the said Sarah or her assigns, notwithstanding her coverture, to receive and take to her own separate use, exclusive of her said intended husband, or any husband she might thereafter marry, the yearly interest, dividends, and proceeds thereof, from time to time during the term of her natural life; and from and after her decease, in trust for the issue of the said intended marriage, if any should be living at the decease of the said Sarah, equally to be divided between them, share and share alike, if more than one, at their respective ages of 21 years; and if but one, then the whole to such only child, at his or her said age of 21 years, with benefit of survivorship in case any or either of such issue should happen to die under the said age; and the interest or dividends thereof to be paid and applied in and towards their respective maintenance and education:” (with a power of appointment to the said Sarah over the said trust-fund, in case she survived the obligor and died without issue of the said marriage, or having issue, but such issue dying under the age of 21; and in default of such appointment, the said trust-fund was to go to John Wienholt, the intended husband.) “And also if the said intended marriage should take effect, and the said Sarah, or any issue thereof, should happen to be living at the time of the death of the obligor, and the obligor should happen to die unmarried and without issue, he the obligor should, exclusive of the above-mentioned provisions, either \*by his last will and testament give and bequeath, or by some other ways or means give or leave, unto or in trust for the said Sarah, or the issue of the said intended marriage, so much in money or in valuable effects as he should by such will give or bequeath to any one of his next of kin, or nearest relations, or to any other person or persons whomsoever, to be paid within 12 calendar months next after the decease of the obligor; or in case the said obligor should make no such bequest in such will to or in trust for the said Sarah, or the issue of the said intended marriage, or if such bequest should fall short of the greatest bequest in such will to any one of his, the obligor’s, next of kin, or any other person whomsoever,

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then if the executors or administrators of the obligor should within 12 calendar months next after the decease of him, the obligor, pay or deliver over to the said Thomas Norman and John Greaves, or the survivor of them, or the executors or administrators of such survivor, such bequest, or make good any deficiency that the same shall fall short of as aforesaid, in trust for the said Sarah and the issue of the said intended marriage, in manner as before mentioned respecting the said 2,000*l.*, or 1,000*l.*, then the above-written obligation to be void and of none effect, otherwise to be and remain in full force and virtue."

[ \*615 ]

The bill further stated, that shortly after the date of the said bond, the said marriage was duly had and solemnized; and there were issue of the said marriage several children, of whom the plaintiff and J. B. Wienholt were the only survivors living at the death of the said Sarah their mother, who had attained their respective ages of 21, and that the said Sarah and John Wienholt died in the lifetime of the obligor. The bill, after \*describing the several interests possessed or represented by some of the parties, defendants thereto, further stated, that the obligor, after the date of the said bond, had a natural daughter, (the appellant Sarah Logan,) who in the year 1795 intermarried with Daniel Birkett the younger, nephew of the obligor, and that the obligor, through the influence of the said Daniel Birkett the younger, and his wife, became desirous of avoiding the effect of the said bond, and of depriving the said Sarah Wienholt and her family of the benefit to which they might be entitled under the same, or of diminishing such benefit; and the obligor, and Daniel Birkett the younger, and the appellant Sarah his wife, at many different times took the advice of counsel as to the most effectual method of accomplishing this object, and consulted and employed several different solicitors for that purpose; and that, in pursuance of the suggestions contained in the opinions so taken, or some of them, and with a view of defeating the operation of the bond, D. Birkett the elder invested large sums of money, in the whole above 100,000*l.*, in the purchase of real estates, for the purpose of withdrawing the property so invested from the effect of the said bond and agreement; and that of such estates some were conveyed originally to himself for life, with

remainder to Birkett the younger, and Sarah his wife, or one of them; and others were originally conveyed to Birkett the obligor in fee, and were afterwards settled by him to the use of himself for life, with remainder to Birkett the younger, and Sarah his wife, or one of them; and that all such conveyances were made for the purpose of defeating the effect of the said bond.

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And the bill further stated, that Daniel Birkett the elder was possessed of leasehold houses in different counties, that he assigned the same at different times to various persons upon trusts for the benefit of himself \*for life, and after his death in trust for Daniel Birkett his nephew, and Sarah his wife, or one of them, absolutely; and that such assignments were made solely or principally with the view of diminishing the amount of the personal property of which Birkett the elder should appear to be possessed at the time of his death; and that amongst several other conveyances and assignments of real and personal estate so made by Birkett the elder, was a voluntary settlement of certain freehold lands at Hadley, in the county of Hertford, and Enfield, in the county of Middlesex, in favour of the nephew and wife, reserving a life interest to the settlor, and the reversion in fee in default of appointment. There was also by the same deed an assignment of an unexpired term of a house in Queen Square, subject to a rent of 18*l.* 10*s.*, upon the same trusts as were thereinbefore declared as to the said freehold estates; and by an indenture of the same date, and likewise without any consideration, certain freehold estates, situate in Cheddiston and Linsted, in the county of Suffolk, were conveyed to trustees for the nephew's family, with a life interest reserved to the settlor. There was also a further voluntary settlement, dated on the 31st March, 1814, of certain other freehold estates in Asfield Thorp, St. Peter's, Westhall, Brampton, Chiddeston, Linsted Parva and Metfield, in the county of Suffolk, in favour of the nephew's family, with a like reservation as in the former cases: and there was another voluntary settlement of the same kind, dated 31st March, 1814, with a like reservation in favour of the settlor.

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The bill further stated, that Daniel Birkett the elder assigned securities for money, in favour of Daniel Birkett the nephew and

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[ \*617 ]

his wife, without consideration, and that amongst such assignments was one dated in March, 1811, of a bond for 16,000*l.*, to Daniel Birkett the nephew; that no notice of the assignment was \*given to the obligors, and the assignor received the dividends to the time of his death: That the settlements were made on the understanding that Daniel Birkett the elder should, notwithstanding, have the power of disposition over the property, and that the nephew and his wife should re-convey and re-assign as he should appoint: That Daniel Birkett the elder transferred large sums of stock to Daniel Birkett the nephew, and Sarah his wife, on condition that he should receive the dividends during his life; that a deed to that effect was prepared; that he went into the City to make the transfer, but changed his mind; that afterwards he consented to make such transfer, on the importunity of Daniel Birkett the nephew, and his wife, and did transfer sums of 20,000*l.* Navy five per cent. Annuities, and 37,000*l.* Three per cent. Consols, into the names of Daniel Birkett the nephew, and wife, in order to evade the bond, and on condition that he should receive the dividends for life. That in the same manner he made an assignment of a mortgage for 2,000*l.* for the benefit of Mrs. Birkett, but reserving a life interest to himself; and that by his will, dated 31st March, 1814, he gave to trustees as follows: "all my household goods, furniture and fixtures, plate, linen, books, pictures, wearing apparel, watches, trinkets, china, glass, wines, liquors, provisions, and other effects, in and about or belonging to my dwelling-house in Hatton Garden aforesaid, and Hadley, in the county of Middlesex, and also my carriage, and everything belonging thereto, in trust for the sole and separate use of Sarah Birkett, the wife of my nephew, Daniel Birkett, and to assign and dispose of the same as she, notwithstanding her coverture, and as if she were a *feme sole*, shall direct or appoint; and I give to the same trustees the sum of 2,500*l.* sterling, upon the like trusts, for the \*separate use of the said Sarah Birkett. I give to my said nephew, Daniel Birkett, the like sum of 2,500*l.* for his own use. I give to my said trustees the sum of 20,000*l.* sterling, which I direct shall be laid out by my said trustees in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real

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securities, to be varied from time [to time] (1) as to my said trustees or trustee for the time being shall seem meet; and I declare that they shall stand possessed of the said sum of 20,000*l.*, and the stocks, funds and securities in which the same shall be invested, and the interest, dividends and annual produce thereof, in trust for the four daughters of my said nephew, Daniel Birkett." He then made certain provisions with regard to the division of this money amongst the daughters of his nephew, and then proceeded in the following manner: "And I give to John Birkett Wienholt and Mary Wienholt, the two children of my late niece, Sarah Wienholt, the sum of 6,000*l.* sterling, to be equally divided between them: and I declare the same to be in full satisfaction of all claims under my bond, bearing date on or about the 8th day of April, 1772; and in case they or either of them shall refuse, upon the request of my executor, to execute an effectual release of the said bond, then I revoke the last-mentioned bequest of 6,000*l.*" The testator, after divers other bequests to servants and others, gave, devised and bequeathed all the residue and remainder of his estate and effects to his said nephew, Daniel Birkett, his heirs, executors, administrators and assigns, for ever, to and for his and their own use and benefit absolutely, and appointed him sole executor of his said will.

The bill further stated that the obligor made a codicil to his will, making an alteration in one of his legacies, but without otherwise revoking or altering the \*same, and died on the 8th of March, 1817, unmarried; and that Daniel Birkett the younger duly proved the said will and codicil, and by virtue of the probate thereof possessed himself of the personal estate of the testator to a very large amount, which after payment of debts, &c. gave a clear surplus of personal estate to the amount of 20,000*l.* and upwards, independently of the personal property assigned and transferred by him in his lifetime as aforesaid; and the said testator's estates, including such property and the value of the real estates settled and conveyed as aforesaid, exceeded 200,000*l.*; and the respondents claimed by virtue of the bond, and in the events that happened, to have paid to them, out of the testator's personal estate, the sum

[ \*619 ]

(1) [These words, omitted in Clark & Finnelly's report, are supplied from 7 Bli. N. S.]

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of 2,000*l.*, and also such further sum as would equal the largest amount of property given by the said testator's will, or by the said dispositions in his lifetime, to take effect in possession after his death, whether the same were of real or personal property.

The bill then charged that the property which passed by the residuary clause in the said testator's will was very large, and was a legacy or bequest within the meaning of the agreement set forth in the said bond, and that the several gifts made by the testator in his lifetime to take effect in possession after his death, whether of real or personal property, were testamentary dispositions within the meaning of the said bond and agreement; and that the real estate was within the meaning and intention thereof, or if not, that the said personal property being invested in real estate for the purpose of taking it out of the effect of the said bond and agreement, such investment was a fraud upon the bond, and the said real estates ought either to be considered personal estate as against the parties claiming under the said bond and agreement, or as a security for the amount of the personalty invested in the purchase \*thereof. And that the conveyances, settlements, transfers and assignments were made without any consideration, as mere gifts, and the testator reserved a life interest in all the property so conveyed and transferred, and also a power of disposition over the same, or if not, at least that he reserved a life interest therein, and that the gifts were only reversionary, and not to take effect in possession and enjoyment till after the death of the said testator; and that all such conveyances, settlements, assignments and transfers, were void as against the respondent Mary Wienholt, and all persons claiming under the said bond.

[ \*620 ]

And the bill prayed that Mary Wienholt might be declared entitled to have the agreement contained in the condition of the said bond specifically performed, and that an account might be taken of the real and personal property of the said Daniel Birkett the elder, conveyed, settled or transferred by him, without consideration, to or in trust for the said Daniel Birkett the younger, and Sarah his wife, or either of them, or their or either of their issue, or in any manner for their benefit, subject to any trust for, or power or interest reserved to the said testator,

either absolutely or for the term of his life, and that all such conveyances, settlements and transfers might be declared fraudulent as against the respondents, and subject to the agreement; and that an account might be taken of the general personal estate of the said testator, and of his debts, funeral and testamentary expenses and legacies, and that the same might be applied in a due course of administration, and that an account might be taken in like manner of all the said real and personal estates so conveyed, settled and transferred as aforesaid, and the rents, profits and produce thereof, and the proceeds of the sales thereof; and that the value of the property to which the respondent Mary Wienholt was entitled \*under the said agreement, and the value of what she was entitled to under the said will, might be ascertained, and that she might be allowed to take the 6,000*l.* bequeathed by the will, or the benefit secured by the bond, according as either should appear most beneficial for her.

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[ \*621 ]

D. Birkett the younger died before putting in an answer to the bill, and appointed his wife, Sarah, (now Sarah Logan the appellant,) and J. Quilter, executor and executrix of his will, and they proved the same, and put in a joint and several answer to the said bill, and therein admitted that the transfers of stock were voluntary, as well as the assignment of the bond debt, but denied that there was any trust in favour of testator in the stock or in the bond debt, and also denied that the testator retained any interest therein, and insisted that the annuities and bond debt ought not to be estimated as part of the testator's personal estate at the time of his death, but that the same must be considered as effectually given away and disposed of by the said testator in his lifetime, in manner aforesaid; and they denied that to their knowledge or belief any part or parts of the said testator's personal estate were or was assigned or transferred to the said Daniel Birkett the younger and defendant Sarah Birkett, or to either of them, subject to any trust in favour of the said testator.

The separate answer of the appellant Sarah Logan, put in afterwards to the amended bill, denied that the bond for 16,000*l.* was subject to the disposition of the testator, or that he had any interest therein; but admitted the testator was to receive the interest during his life, and that Daniel Birkett the nephew

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executed a counter bond for payment of such interest ; and that appellant believed that obligors had notice of the assignment ; and that it was the intention of the \*parties that D. Birkett the elder should receive the dividends of the stock during his life. And the appellant admitted it to be true, that some time before the transfer was made, the testator had agreed to make such transfer to her or her husband, or both, but she denied that to her knowledge and belief the same was done upon the opportunity of herself or her husband ; and she admitted that the said testator did agree to make and did make such transfer, for the purpose of diminishing the amount of his property which was to pass by his will, but she denied that it was to evade or defeat the agreement in the said bill mentioned ; and she denied also that the said testator consented to make such transfers, or any of them, upon any written declaration of trust or agreement being made, or under any verbal promise by D. Birkett the younger, or the appellant, or either of them, that such stock should be re-transferred to him the said testator, whenever he should call for the same, although she admitted it was understood and agreed that the dividends of such stocks or funds should be paid to him the said testator : That Daniel Birkett the elder intended to prevent the respondents taking anything more than was bequeathed to them, and that he disposed of the bulk of his property in his lifetime, so as to prevent his will operating thereon.

[ \*623 ] The appellant admitted the assignments of leaseholds, and that they were made that the property might not be subject to his will ; she admitted also the assignment of the bond debt of 16,000*l.*, and of a mortgage debt of 2,000*l.*, and also a mortgage for 1,523*l.* 17*s.* 2*d.* on St. Mary Hill estate, in the island of Tobago, which by his private cash-book he appeared to have given to his nephew in 1808 ; and that such assignments were made without valuable consideration. The appellant referred to entries in the private cash-book of Daniel Birkett the \*elder, to shew that these had been regularly entered, but admitted that, notwithstanding the transfer, Daniel Birkett the elder received the interest of the bond debt to the time of his death. She denied, however, that it was agreed the testator should have the power of disposing of the property settled or assigned, or that

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there was any secret trust as to that property, except as appears by the conveyances and assignments. She admitted the transfer of 20,000*l.* Navy Five per Cents. and 37,000*l.* Three per Cents. into the names of Daniel Birkett the nephew, and Sarah his wife, and that such transfer was without valuable consideration; and that it was intended to pay the dividends to the testator for life, but that he died before the dividends became due; and that he reserved to himself no power of disposition over the stock, and did not mean the stock to be subject to his will.

The appellant, on her marriage with Mr. Logan, her second husband, conveyed and assigned all her real and personal estate to trustees, for her separate use; and these trustees and Mr. Logan were made parties to the suit, by supplemental bill.

The cause came on to be heard before the Lord Chancellor, who by his decree dated on the 31st of May, 1825, declared, that the condition of the said bond contained an agreement which ought to be specifically executed by the Court, according to the true intent and meaning thereof, and that the parties intended to be benefitted thereby were not bound to accept the penalty of the said bond, or the legacy given by the said testator's will, but were entitled in equity to have the full benefit of the provision agreed to be made in manner in the said condition mentioned; and his Lordship further declared, that the said testator having died unmarried and without lawful issue, the sum of 2,000*l.* \*ought to be paid out of his estate, according to the said agreement, for the benefit of the parties entitled thereto, with interest at four per cent. from one year after the testator's death; and that exclusive of such provision, the testator ought to be considered as having engaged by will or otherwise to give or leave to or in trust for the parties meant to be entitled to the benefit of the said agreement, so much in money or in valuable effects as he should give or leave to any one of his next of kin, or any other person or persons, to be paid within twelve calendar months next after his decease; or if he should make no such bequest in his said will, or the same should fall short of the greatest bequest in such will, then that his executors or administrators should, for the benefit of such parties as aforesaid, pay or deliver over such bequest, or make good

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any deficiency that the same should so fall short. And his Lordship declared, that according to the true construction of the agreement contained in the said bond, the respondents electing to take under that agreement, and not to accept the 6,000*l.* bequeathed by the will, were entitled to claim so much of the testator's property disposed by his will as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, whether specific, pecuniary or residuary legatee; and did declare further, that the assignment of the 16,000*l.* bond debt, the 2,000*l.* mortgage debt, the transfers of the said 37,000*l.* Three per cent. Annuities, the 20,000*l.* Navy Five per cent. Annuities, and all other voluntary dispositions of personal property remaining personal at the testator's death, in which he reserved or retained a life interest, or over the disposition of which he had a power of appointment or revocation, ought to be considered in equity, for the purpose of giving effect to the true intent and meaning of the said agreement, \*as having the same effect as if the said sums of 16,000*l.*, 2,000*l.*, 37,000*l.*, 20,000*l.*, and such other personal properties so voluntarily disposed of, had been bequeathed by the testator's will to the persons after his death respectively entitled thereto. And it was ordered that it be referred to the Master to inquire whether the testator in his lifetime made any and what other voluntary dispositions, as to his personal estate, which would fall within the declaration as to voluntary dispositions; and that the then defendants should transfer the said sums of stock, respectively standing in their names, into the name of the Accountant-General in trust in the cause, and pay the dividends thereon, until such transfer, into the Bank: and that the Master should inquire into the circumstances of the transfers by the testator. And it was ordered that the said Master should inquire what purchases were made by the testator of real property, after the execution of the said bond, of which the conveyances or assurances were originally taken either to himself or in trust for himself in fee, and as to which, by subsequent acts, assurances or conveyances, and of what dates, he afterwards reduced himself to be tenant for life in law or equity, and with remainder or remainders to other person or persons, and

[ \*625 ]

to whom, and also what purchases of real property were made by the testator after the execution of the said bond, taking the conveyances or assurances to or in trust for himself for life, with remainder or remainders over, and to whom. And it was ordered that an account should be taken of the personal estate of the said testator that had come into the hands of the present appellants, or any person or persons by their or any of their order or for their use, including what might have been received under the voluntary dispositions of \*personal estate, as to which the respondents were thereby declared to be entitled to be relieved.

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[ \*626 ]

The Master having made his report, the case came on to be heard on exceptions to that report, and for further directions, before the Vice-Chancellor, on the 7th day of March, 1829; who, by a decree then made, declared that the exceptions against the said Master's report be overruled, and that the several voluntary dispositions of personal estate made by the testator were to be considered in equity, for the purpose of giving effect to the agreement contained in the condition of the bond, as having the same effect as if the personal estate so voluntarily disposed of had been bequeathed by the testator's will to the persons who after his death were intended to take the benefit of such dispositions. And it was declared, that according to the true construction of the said agreement, all testamentary dispositions of freehold, and copyhold, and leasehold estates, and dispositions of that nature, which by the decree in the cause were declared to be of the nature of testamentary dispositions, were within the intent and meaning of the said agreement. And that all the several freehold and copyhold estates, purchased by the said testator after the execution of the said bond, were to be considered in equity, for the purpose of giving effect to the true intent and meaning of the said agreement, as if the said real estates had been given or devised by the said testator's will. And it appearing that Daniel Birkett the younger was the person to whom, by such testamentary dispositions as aforesaid, or dispositions in the nature of testamentary dispositions, the largest benefit was given, it was referred to the Master to compute what, at the time of the testator's death, would have been the amount

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[ \*627 ]

and value of the benefits which \*the said Daniel Birkett the younger would have taken under such several dispositions as aforesaid, according to the declarations contained in the said decree made on the hearing and in that order, if the said bond had not been made; and it was declared that the respondents were entitled to stand as specialty creditors upon the estate of the said testator, for a sum equal to such amount and value, with interest thereon at 4l. per cent., from the end of a year from the death of the testator. And it was further declared that, as between the parties taking the freehold and personal estate of the testator, the general personal estate should be first applied, then the personal estate specifically bequeathed or disposed of, and lastly the freehold estates, in satisfaction of the demand of the plaintiff and the defendant John Birkett Wienholt (the present respondents). And it was referred to the said Master to take the subsequent accounts of the personal estate of Daniel Birkett the elder, received by the appellants, including what might have been received under the voluntary dispositions of personal estate, as to which the respondents are thereby and by the decree in that cause declared entitled to be relieved. And that in case the funds in Court, and other property applicable thereto under that decree, should not be sufficient to answer what should be found to have been received by Daniel Birkett the younger, it was ordered that the deficiency be answered by Sarah Logan his executrix, out of his estate and effects. And the Master was directed to inquire who, since the date of the decree, had been entitled to receive the rents, dividends and interest of the separate estate of Sarah Logan, and to whom the same had been respectively paid; and in case he should find Sarah Logan to have been in the receipt and enjoyment of the said rents, dividends, and interest, he was to inquire \*whether her receipt thereof respectively was or not with the permission of her trustees, and to state the particulars of the said separate estate, and what had become thereof, and to state special circumstances.

[ \*628 ]

The appellants appealed against both the decrees, and the case was several times argued by *Sir C. Wetherell* and *Mr. Pepys*

for the appellants, and by *Sir E. Sugden* and *Sir W. Horne* for the respondents.

LOGAN  
v.  
WIENHOLT.

For the appellants, it was contended that the question was whether the agreement must be taken to affect the whole of the testator's property, or whether its operation was to be limited by the amount of the penalty. \* \* Another question was, whether the testator only meant a gift *inter vivos*, or whether he intended to take away from himself any possible discretion to dispose of his property as he pleased during his life. \* \* \*

(THE EARL OF ELTON: It was left to the Master to examine whether the real estate had not been purchased in fraud of the agreement. The evidence given before the Master shewed that in this case purchases had been made in fraud of the agreement, and the principle on which the case turned was, that the testator could not be allowed to commit a fraud upon his own agreement. If a man agreed to leave all his children equally, and during his life gave to one of them a sum of money, that would be a gift in charity; but if he only gave the money, reserving to himself a life interest, that would not be a gift within the meaning of the covenant.)

[ 629 ]

For the respondents [the case of *Chilliner v. Chilliner* (1) before Lord Hardwicke, was cited], where a father had agreed to settle property on a marriage, and then gave a bond for 600*l.*, with 1,200*l.* penalty if he did not make the settlement, he had not afterwards the election to forfeit the 600*l.* or to settle; the settlement being treated as the primary agreement, and the 600*l.* as only a penalty or further security. \* \* [The cases of *Jones v. Martin* (2), and *Randall v. Willis* (3), were also cited to shew] that when real estate was improperly acquired by money that was already subject to the stipulations of an agreement, it should be treated as personal estate, for the purpose of avoiding the fraud upon that agreement.

[ 630 ]

[ 631 ]

In reply, it was contended that if the doctrine contended for by the respondents was admitted, a person could not vest

(1) 2 Ves. sen. 528.

(3) 5 R. R. 40 (5 Ves. 262).

(2) 5 R. R. 32 (5 Ves. 266, n.).

LOGAN  
<sup>r.</sup>  
 WIENHOLT.  
 [ \*632 ]

personalty in land without its being liable to a bond creditor. Lands purchased as these had been, were withdrawn from the operation of the \*agreement, and it would be absurd to carry the doctrine contended for by the respondents so far as they now desired, for that would be to make an agreement contained in a bond entered into with a penalty of 4,000*l.*, affect the disposition of property that might amount to 100,000*l.* This never could have been the intention of the parties, nor would the law permit such a consequence.

1832.  
July 27.

The EARL OF ELDON said that he saw no reason to change the opinion he had formed in the Court below.

THE LORD CHANCELLOR :

In the course of the argument, it had been the opinion of all the Lords who had heard the case, that great difficulties had been pressed upon their consideration. It had been thought that the condition of the bond must be taken to operate *in limine*. That was the foundation of the decree of Lord ELDON, and they felt that they could have no difficulty in concurring with that view of the matter. The difficulty had arisen upon what had been since done, namely, in the decree of the VICE-CHANCELLOR; and as that difficulty which had been raised in the discussion had not been removed, he should propose taking further time for consideration. But without stating that he possessed any distinct opinion on those important points to which the decree of the VICE-CHANCELLOR had given rise, he could not avoid expressing the strong inclination of his opinion on one or two of the matters on which the VICE-CHANCELLOR had decreed. He should say nothing with respect to the 57,000*l.* that had been transferred, which the VICE-CHANCELLOR dealt with as if transferred to Daniel Birkett the younger : on that he had some doubt. But that on which he had less doubt, and where his opinion was opposed to that of the VICE-CHANCELLOR, \*was that part of the decree where his Honour had said that all the testamentary dispositions of leasehold, freehold and copyhold estates, were within the intent and meaning of the agreement. He was not prepared to say that that was the true construction

[ \*633 ]

LOGAN  
v.  
WIENHOLT.

of the agreement; he should rather say that it was confined to personalty. But that on which he had a very strong impression was, as to the mode of calculation adopted with regard to the bequests. The result of his Honour's decree on that point was, that it was the plain and obvious meaning of the parties to this agreement that, whatever the most favoured person received in personalty or realty, as much should be given to Sarah Jopson; so that whatever was given to Daniel Birkett, would be suddenly taken away from him, and given to Sarah Jopson, who, getting this in addition to what she before had, would therefore take nearly the whole. He was not prepared to put a construction on the agreement that would produce such a result. The parties ought to agree among themselves as to the division of this property; but as they would not agree, they ought to give in schemes of what each asked to obtain from their Lordships.

LORD PLUNKETT entirely concurred with the LORD CHANCELLOR on the points now referred to. There was not any difference of opinion or any doubt as to the propriety of the decree first made in this case. What Lord ELDON had decided had been most properly decided; but his decree necessarily left a great many most important points untouched. The first of these points was, whether the contract related to more than personal estate. On that point he should wish for further time to consider the case and refer to the authorities. The second point was, if the House would go the length of \*saying that the contract related merely to the personalty, and not to the real estate, and if so, then whether the party had a right to vest his personal estate in the purchase of real estate; a question, indeed, whether their Lordships would follow the motive of the party in transferring his property from personalty to realty, and would say that it was done for the purpose of increasing one fund and diminishing another, and if so, whether in their opinion it was done with a view fraudulently to defeat the agreement. Then came the important questions as to the transfer of the 37,000*l.* stock: as to the mode of ascertaining the amount; then, in what way the fund should be distributed, and how to give effect to the contract. It was impossible to say on this contract, though no doubt a

[ \*634 ]

LOGAN  
c.  
WIENHOLT.

great benefit was intended to be given to Sarah Jopson, no greater benefit indeed to any person than to her; still, it was impossible to say that it was intended she should get all; at least so he thought at present. But if that should in the end be considered to be the effect of the contract, their Lordships must see it carried into execution.

The EARL OF ELDON desired that counsel on both sides should draw up the minutes of what they claimed respectively, in such way as they thought proper.

1833.  
April 4.

Their Lordships, by an order bearing date on the 4th of April, 1833, and reciting the substance of the two decrees of Lord ELDON and of the VICE-CHANCELLOR, confirmed them both.

[ \*635 ]

That part of his Honour's decree which had been doubted, namely, that relating to the liability of the after-purchased real estate to the claims of the obligees in the bond, was referred to in the following terms: "And their Lordships further found and declared, \*that all the real estates referred to as having been purchased after the 5th of April, 1804, and in which purchases, or by any subsequent conveyance, Daniel Birkett the elder retained any interest for his life or in fee, and gave any interest to Daniel Birkett the younger, ought, for the purpose of the said agreement, to be considered as personal estate, and as if made the subject of testamentary disposition to Daniel Birkett the younger, and to be dealt with as part of the residue, in so far as Daniel Birkett the younger's interest was concerned." Their Lordships' order further declared, that "the demand of the respondents was a debt by specialty, and as such entitled to priority over both the simple-contract debts and the legacies, whether residuary or otherwise, and that the whole of the property disposed of by the will, under the description of residue, was applicable to discharge such debt to the respondents; and if that fund should not be sufficient, then that the shares of Daniel Birkett the younger and his wife were liable, for satisfaction of this claim, to abate in proportion to the amount of the benefits taken by them under the will, or by gifts in which Daniel Birkett the elder retained any interest during his life."

RHODES *v.* DE BEAUVOIR.

(6 Bligh (N. S.) 195—275; S. C. 6 Clark &amp; Finnelly, 532 (1).)

A lessee obtained a new lease from his lessor at a very inadequate rent by secretly employing and bribing the lessor's solicitor to act on his behalf.

The lessor, who was confined to his bed by age and illness, had full confidence in his solicitor, and executed the lease prepared by him in ignorance of the fact that he was also acting on behalf of the lessee.

There was some evidence that the lessor intended to favour the lessee.

The House of Lords varied a decree of the Court of Chancery (setting aside the lease) by directing issues on the questions of fraud and undervalue with special reference to the alleged favourable intent.

1832.

Mar. 16, 19,  
23, 26, 30.

April 2, 5.

Aug. 5, 16.

Lord  
BROUGHAM,  
L.C.

[THE appellant, William Rhodes] having a lease of lands near London, adapted for building, and improving in value, with which advantages he was well acquainted by residence on the spot, employed Thomas Tebbutt, the confidential solicitor of his landlord [the Rev. Peter Beauvoir,] to apply for a new lease. An agreement for a long lease, at a gross undervalue, and upon terms very disadvantageous to the landlord, was obtained by the co-operation of the solicitor Thomas Tebbutt, at a time when the landlord, an old man of 84, was confined to his bed by illness, it being supposed by the solicitor that he was dying.

[ 195 ]

The agreement, which contained a proviso that Thomas Tebbutt should be employed in preparing the underleases on the property, was signed on a Saturday. On the following day (Sunday) instructions were sent by the solicitor to a conveyancer to prepare the lease on behalf of the lessee, and many of the covenants usual in such leases were omitted. The lease was prepared and executed on the following Wednesday, the landlord not being duly apprized that his solicitor was thus acting for his tenant.

The proviso in the agreement for the employment of the solicitor in the underleases was not inserted in the lease. But by arrangement between the tenant and the solicitor it was omitted; and as a substitution to secure this advantage, a bond for 10,000*l.* was given to the solicitor by the tenant, who also gave him a gratuity of 100 guineas upon the settlement of his bill [which amounted to 120*l.*]

The landlord died some months after signing the agreement

(1) Shortly reported in 6 Cl. & Fin. as a note to *Attwood v. Small*.

RHODES  
r.  
DE BEAU-  
VOIR.

and executing the lease, and [the respondent who was] entitled under his will to a life estate in the premises, with a remainder in fee, subject to intervening contingent uses, accepted rent from the tenant for some time after the death of the deviser, but in ignorance of the facts as to the procurement of the lease. Having discovered the facts, he filed a bill to set aside the lease, on the ground of fraud and imposition; and by decree in Chancery the lease was set aside, as unfairly and improperly obtained. [The defendant appealed.]

[ 260 ]

*Mr. Pepys and Mr. Ching, for the appellants.*

*The Solicitor-General (Sir W. Horne), and Sir Edward Sugden, for the respondents.*

In the course of the argument, the following observations were made:

\* \* \* \* \*

April 5.

THE LORD CHANCELLOR:

[ 265 ]

The question is, whether the lease was obtained by fraud and imposition, and it might be such fraud and imposition as a Judge and jury could try (they knowing what they call fraud and imposition at common law). But the finding might negative that, and they might say that there was no such fraud and imposition as the Court of Chancery had sent to them to try, and still might have left a question between the parties; namely, considering the relation in which the parties stood to each other—the Tebbutts' position with respect to Mr. Beauvoir rather than Mr. Rhodes, who was the former tenant; and considering the peculiar circumstances under which Mr. Rhodes (as it is said through Mr. Tebbutt) obtained that lease—whether the proof of adequate value was not thrown upon the party obtaining the lease. Then another consideration might arise as to the adequacy of the value; and it might be a question of adequate or inadequate value, absolutely so called; that is to say, whether it was such a value, such terms, as might have been obtained from any solvent and responsible tenant, though a stranger. That would dispose of the question, if it were proved that such a consideration were given for the lease as \*any stranger, solvent

[ \*266 ]

and responsible to perform his engagements, would have given for it, supposing that the question whether an adequate value was given, were the only question. But this other question might arise: Suppose the terms were not such as any solvent or responsible tenant would give, might not Mr. Beauvoir have intended to favour Mr. Rhodes? Then there would on this point be two questions to be tried: First, did he or did he not intend to give a favour or benefit to Mr. Rhodes? Secondly, if he did intend to give such favour or benefit to Mr. Rhodes, whether (regard being had to that intention) the terms obtained were such as ought to have been obtained under such circumstances? All that was thrown out in the former proceeding as to an issue, was to try whether the lease was obtained by fraud and imposition which, I apprehend, if it had gone to be tried at law, would only reach to one enquiry; but the parties would have had the benefit of examining the Tebbutts, and it might be advantageous with respect to Dale's evidence. Mr. Dale says a conversation took place in the evening between Mr. Beauvoir and himself with respect to this lease; and, he says in the course of the conversation that he understood from Mr. Beauvoir (the words are, that he understood) that he had doubts whether he should grant the lease or not. The words are, "that in the evening of the same day he again saw the said Peter Beauvoir in his bedroom, when some conversation took place between Mr. Beauvoir and himself in regard to the proposed agreement; and that he understood from the conversation of Peter Beauvoir that he felt considerable doubt as to whether it was advisable or not for him to agree to grant such proposed new lease." Now, if one had had the very words which \*Mr. Beauvoir used, we should have been able to tell more about it. The solicitor was made the instrument by a stranger for obtaining an advantageous lease from the landlord (who was the client of the solicitor), which the solicitor himself, if it had been for his own benefit, could not have obtained. He must have proved that an adequate consideration was given, not adequate in the second sense, but in the first sense and best sense, namely, the utmost that could have been got from a solvent person.

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v.  
DE BEAU-  
VOIR.

[ \*267 ]

\* \* \* \* \*

RHODES  
v.  
DE BEAU-  
VOIR.

Aug. 16.

[ 270 ]

Judgment was delivered, on the motion of the LORD CHANCELLOR, with the following observations :

[ \*271 ]

The noble and learned Lords, the benefit of whose assistance we had at the hearing of this case, have conceived in opinion with me that it is fit that certain issues should be tried ; and I have to propose such issues, giving direction by way of the substance of those issues which ought to be framed, in order that this matter may be satisfactorily investigated. The proposition which I have to submit \*to your Lordships is, that the matter be remitted to the Vice-Chancellor—to the Court of Chancery, indeed (from which the appeal came), with directions to frame issues for the trial of the matter ; the substance of which issues will be contained in the directions to be given ; and those directions and instructions are to this effect : The first issue is to be generally, was the lease obtained by fraud and imposition ? The second, did Mr. Peter Beauvoir know at the time he executed the agreement that Tebbutt was Rhodes's solicitor as well as his own ? The third, was the lease granted at an undervalue, supposing Mr. Rhodes was a stranger ? The fourth, did Mr. Peter Beauvoir intend to favour Rhodes in the lease ? The fifth, was the lease granted at an undervalue, supposing Mr. Peter Beauvoir intended to favour Rhodes ? To which I should have added directions to examine Thomas Tebbutt, who was made a defendant ; but that, I understand, can be no longer operative, because it appears that that person has since died. Any questions that may arise as to the mode of framing these issues, or as to any directions to be given, touching any witnesses to be examined, or depositions to be read on the trial of these issues, as consistent with former practice, will be most conveniently and competently made by the Court to which this case shall be remitted.

[ 275 ]

The issue was tried in the Court of Exchequer, in Michaelmas Term, 1834, before a special jury, who, after eight days' trial, found verdicts upon all the issues for Mr. De Beauvoir, the plaintiff in equity and at law in the first issue.

## CHANCERY.

LIMBARD *v.* GROTE.

(1 Myl. &amp; Keen, 1—3; S. C. 2 L. J. (N. S.) Ch. 10.)

A daughter being entitled under the marriage settlement of her father and mother to such share and interest in lands and money, as the surviving mother should appoint, provides by her own marriage settlement, that all such share and interest to which she should become entitled, under her mother's settlement, should be vested in trustees to the use of her intended husband for life, remainder to herself for life, remainder to the children of the marriage.

Four years after the marriage, the mother appoints a sum of 3,000*l.* to be paid to the trustees of the daughter's settlement, upon the uses therein expressed, in satisfaction of the daughter's share and interest under the marriage settlement of the father and mother: Held, that this was substantially an appointment to the daughter, and therefore valid.

By the settlement made on the marriage of Henry Peckwell and Bella Blosset, dated the 19th and 20th of February, 1773, certain lands and money were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, in such shares and proportions as the husband and wife should during their lives jointly appoint, or, for default of a joint appointment, as the survivor should by deed or will appoint; and in default of any appointment, to the children as tenants in common in fee.

The husband died, leaving his wife surviving him; there having been no joint appointment.

There were issue of the marriage two children: Robert Henry Peckwell, afterwards Sir Robert Henry Blosset, and a daughter named Selina Mary. After the death of the father, the daughter intermarried with George Grote, and by the settlement made in contemplation of that marriage, dated the 7th and 8th days of October, 1793, it was provided that all the estate and interest to which Selina Mary should become entitled after the death of her mother, by virtue of the settlement of 1773, should be settled to the use of the husband for life; remainder to the wife for life; remainder to such one or more of the children of the marriage as the husband and wife jointly, or the survivor should appoint; and for default of appointment, to the children equally.

Afterwards, by a deed poll, dated the 23rd of December, 1807,

1832.  
Nov. 13.

*Rolls Court.*  
LEACH, M.R.  
[ 1 ]

[ 2 ]

LIMBARD  
v.  
GROTE.

Bella Peckwell executed the power of appointment under her marriage settlement, and thereby appointed all the lands and money to which her power extended, to her son, Sir Robert Henry Blosset, to be an immediate vested interest in him, but to take effect in possession after her death, charged with the payment thereout, after her death, of a sum of 3,000*l.* to the trustees of her daughter's marriage settlement, upon the trusts, interests, and purposes expressed in the said settlement, and which sum was, by the said deed poll, stated to be appointed and intended to be taken and received in full satisfaction of all the share and interest of her said daughter under the marriage settlement of her the said Bella Peckwell.

The material question in the cause was, whether this appointment of the mother was a valid execution of her power, not being in form, as it applied to the daughter, an appointment to a child of the marriage, but for the benefit also of the husband of the daughter and of the \*daughter's children, who were not objects of the mother's power of appointment.

[ \*3 ]

*Mr. Sidebottom*, for the appointees, cited *White v. St. Barbe* (1):

\* \* So in *Langston v. Blackmore* (2), an appointment to a son, remainder to such wife as he should marry, remainder to his issue, under a power to appoint to children, was held good, inasmuch as the son might, if the appointment had been made to him absolutely, have immediately afterwards settled the property in the same manner. If, however, the appointment in favour of Mrs. Grote should be held to be bad, then the whole would enure to the benefit of Sir Robert Henry Blosset, in whose behalf the power was well executed. *Alexander v. Alexander* (3), *Palmerv. Wheeler* (4).

*Mr. Tinney*, *contrà*, contended that the appointment was bad, inasmuch as it was an appointment to persons who were not objects of the power. If the appointment were bad, such part of the fund as was ill appointed would go to the children, to whom it was limited in default of appointment: *Routledge v. Dorril* (5).

(1) 12 R. R. 246 (1 V. & B. 399).

(2) *Ambl.* 291.

(3) 2 Ves. sen. 640.

(4) 12 R. R. 60 (2 Ba. & Be. 18).

(5) 2 R. R. 250 (2 Ves. J. 357).

## THE MASTER OF THE ROLLS :

LIMBARD  
v.  
GROTE.

The appointment of the 3,000*l.* by the mother is substantially an appointment to the daughter, being in execution of the daughter's contract in her marriage settlement, and is therefore a valid appointment.

## PIERCY v. ROBERTS (1).

(1 Myl. &amp; Keen, 4—11; S. C. 2 L. J. (N. S.) Ch. 17.)

1832.  
Nov. 5, 12.  
Dec. 14.Rolls Court.  
LEACH, M.R.

[ 4 ]

A testator bequeathed a legacy of 400*l.* to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner as they should in their judgment and discretion think best; and he directed that upon the death of his son any unapplied part thereof should sink into his own residuary estate: Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent.

THOMAS ROBERTS, by his will dated the 18th of January, 1829, bequeathed to his executors the sum of 400*l.* upon trust, to pay, apply, and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of his son, Thomas Jortin Roberts, in such smaller or larger portions, at such time or times immediate or remote, and in such way or manner as they the said executors, or the survivor of them, or the executors or administrators of such survivor, should in their judgment and discretion think best: and, after bequeathing to his executors the further sum of 400*l.* upon similar trusts, for the benefit of his son John Prowting Roberts, the testator proceeded as follows: "And, in case of the deaths of either or both of my said sons, Thomas Jortin and John Prowting, before the whole of the said several sums of 400*l.* and 400*l.*, and the interest thereof respectively, shall have been paid or applied for the purposes aforesaid, then I will and direct that the unapplied part or parts thereof respectively shall sink into and become part of my residuary personal estate, and go and be applied therewith as hereinafter mentioned:" and the testator thereby appointed his wife, Ann Roberts, his residuary legatee, and the said Ann Roberts and John Jortin executors of his said will.

(1) *In re Johnston*, '94, 3 Ch. 204, 63 L. J. Ch. 753, 71 L. T. 392.

PIERCY  
v.  
ROBERTS.  
[ \* 5 ]

The testator died in July, 1829, and in May, 1830, the testator's son Thomas Jortin Roberts took the benefit of \*the Insolvent Debtors' Act. Previously to May, 1830, Thomas Jortin Roberts had received several sums from the executors, amounting in the whole to 156*l.*; and since that period, and before the filing of the bill, he had received several other sums, amounting together to 112*l.* The bill was filed by the assignee of the insolvent's estate against the executors of the testator, to recover the legacy of 400*l.* and the interest thereof, or so much thereof as remained unpaid at the time of the discharge of the legatee under the Insolvent Debtors' Act.

*Mr. Bickersteth* and *Mr. Girdlestone*, jun., for the plaintiff  
[cited *Brandon v. Robinson* (1), *Ross v. Ross* (2), and *Graves v. Dolphin* (3).]

[ 6 ] *Mr. Pemberton*, and *Mr. Elderton*, for the defendants :

[In the cases cited the interest given to the bankrupt was a vested interest. In the present case, there is a limitation over to the residuary legatee, in the event of the whole of the 400*l.* and interest not being paid in the lifetime of the legatee;] and the executors have a right to determine the bounty of the testator upon an event which it is reasonable to suppose the testator himself had in his contemplation.

*Mr. Bickersteth*, in reply :

There can be no doubt that a testator may make a limitation over on the insolvency of a legatee; but this the testator has neither done in terms nor in effect. He has made a limitation over in the event of the death of the legatee, which excludes the notion of his having intended to give the legacy over in any other event. \* \* \*

#### THE MASTER OF THE ROLLS :

The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee; or whether it may remain in the hands of the executors, to be applied, at

(1) 11 R. R. 226 (18 Ves. 429).

(3) 27 R. R. 166 (1 Sim. 66).

(2) 20 R. R. 263 (1 Jac. & W. 154).

their discretion, for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment.

PIERCY  
v.  
ROBERTS.

[A preliminary objection, not material to the point here reported, was then argued and determined.]

### PATTISON v. PATTISON (1).

(1 Myl. & Keen, 12—15; S. C. 2 L. J. (N. S.) Ch. 15.)

1832.  
Nov. 21.

*Rolls Court.*  
LEACH, M.R.  
[ 12 ]

A testator gave to M. F., whom he afterwards married, among other bequests, 50*l.* Long Annuities, which he had purchased with 1,000*l.* left him by the will of J. T. After his marriage he made a codicil, by which he confirmed to his wife the benefits given to her by his will, in addition to the provision made for her by her marriage settlement. He afterwards sold his Long Annuities, and with the produce purchased New Annuities, which differed only from the Long Annuities by being terminable a quarter of a year sooner. Subsequently to this transaction he made another codicil, by which he confirmed his will and former codicil: Held, that the legacy of 50*l.* Long Annuities was adeemed.

JAMES PATTISON, by his will, dated in April, 1829, gave to Margaret Forbes, among other bequests, the sum of 50*l.* Long Annuities, which he described as purchased with 1,000*l.*, left him by the will of James Tillard, Esq.

The testator subsequently intermarried with Margaret Forbes; and by a codicil to his will, he confirmed to her, in addition to what she was entitled to under the settlement made upon her marriage, all and every sum and sums of money, property, estate, and effects given and bequeathed to her, under the name of Margaret Forbes, by his will.

At the time of making his will, the testator had, besides the 50*l.* Long Annuities specifically bequeathed, other annuities of the same description; and he afterwards exchanged all his Long Annuities for New Annuities; by which exchange he made a profit by way of bonus, amounting to 100*l.* The term for which the New Annuities were granted, was shorter than the term of the Long Annuities by a quarter of a year.

(1) Cp. *Macdonald v. Irvine* (1878) 8 Ch. Div. 101, 47 L. J. Ch. 494, 38 L. T. 155.

PATTISON  
PATTISON.

Subsequently to this transaction, the testator made another codicil, by which he confirmed his will and former codicil. The question in the cause was, whether the widow was entitled to the 50*l.* New Annuities purchased with the produce of the 50*l.* Long Annuities given to her by the will.

[ 13 ]      *Mr. Bickersteth* and *Mr. Lloyd*, for the widow [cited *Barker v. Rayner* (1) and *Selwood v. Mildmay* (2).] A codicil, confirming the dispositions of a will, operates as a republication of the will, and is to be construed as if the testator had written his will over again at the date of the codicil : *Perkins v. Micklethwaite* (3). \* \* \*

*Mr. Pemberton* and *Mr. Wigram*, *contra* :

[ 14 ]      \* \* A codicil operates as a republication of a will for certain purposes, but it cannot have the effect of setting up a specific legacy, which would otherwise fail. A codicil confirming a will can never have the effect of altering the construction of such will. \* \* \*

[ 15 ]      *Mr. Bickersteth* replied.

#### THE MASTER OF THE ROLLS :

The law is settled that a legacy is adeemed if the specific thing do not exist at the testator's death. The testator truly described the specific gift when he made his will, and there can be no relief upon the ground of mistaken description.

1832.  
Nov. 26.  
Dec. 14.  
  
*Rolls Court.*  
LEACH, M.R.

#### CLUTTERBUCK *v.* CLUTTERBUCK.

(1 Myl. & Keen, 15—20 ; S. C. 2 L. J. (N. S.) Ch. 113.)

A testator directed the sum of 2,000*l.* to be raised out of a certain freehold estate, and paid in satisfaction of certain specified debts, and all such other debts as he should owe at his decease ; and he gave the rest, residue and remainder of his estate and effects, real and personal, to his wife, her heirs, &c. : Held, that the 2,000*l.* was the primary fund for the payment of the debts.

THE testator Thomas Clutterbuck, after giving several specific and pecuniary legacies [devised all that farm, known by the

(1) 26 R. R. 18 (5 Madd. 208).

(3) 1 P. Wms. 275.

(2) 4 R. R. 1 (3 Ves. 306).

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name of Fareham farm, which he held by lease for lives, and all other his lands, in the county of Southampton, unto and to the use of his brother Dr. Henry Clutterbuck, John Deeble Brown, and Richard Pearce, and their heirs, upon trust, that they the said trustees, and the survivors and survivor of them, and the heirs of such survivor, should by mortgage of the said tenement called Fareham farm, or a competent part thereof, or by such other ways and means as they should think fit, raise such sums of money as should be sufficient to pay the fine, and the costs and charges of and attending the renewal of the present and every future lease and leases of the said tenement called Fareham farm; and upon further trust when and as soon as such new and other lease should have been obtained as aforesaid, or as soon after as conveniently may be, by mortgage, sale, or devise of the premises or a competent part thereof, to raise the sum of 2,000*l.*; and thereout, in the first place, pay and satisfy the debts due and owing from him to his brother Charles Caspar Clutterbuck, and his said brother Henry Clutterbuck respectively, or so much as should be then unpaid, and also a debt due from him to Miss Frances Penneck of 400*l.*, with such interest as may be then due thereon, and also all such other debts as might be due and owing from him at the time of his decease; and upon further trust from time to time, to receive the rents and profits of the said lands called Fareham farm, and pay thereout certain annuities therein mentioned, and subject to the trusts aforesaid to pay the rents and profits thereof to his wife Jane Clutterbuck, for her life; and after her decease, to the use of his nephews, as therein mentioned; and all the rest, residue, and remainder of his estate and effects, real and personal, and wheresoever situate, he devised and bequeathed unto and to the use of his said wife, her heirs, executors, and administrators respectively, according to the nature and quality of the same.]

The question in the cause was, whether the 2,000*l.* directed to be raised out of the Fareham farm, was the primary fund for the payment of the testator's debts, or auxiliary only to the personal estate.

[ 18 ]

*Mr. Jacob* contended, that there was nothing in the will that

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BUCK.

[ \*19 ]

indicated an intention on the \*part of the testator to exonerate the natural fund for the payment of his debts. \* \* \*

*Mr. Bickersteth*, on the other side, [cited *Greene v. Greene* (1), *Michell v. Michell* (2).]

*Mr. Jacob*, in reply, observed, that the present case was distinguishable from *Greene v. Greene* and *Michell v. Michell*, inasmuch as in the former of those cases the testator's funeral expenses, and in the latter the testator's funeral and testamentary expenses were expressly charged upon the real estate.

Dec. 14.

THE MASTER OF THE ROLLS :

[ \*20 ]

I am of opinion, that the 2,000*l.* is provided by the testator as the primary fund for the payment of his debts. It is not a contingent, but an immediate charge \*upon the devised estate for the payment of the specific debts, and all other the debts which might be due and owing from him at his death ; and the residuary gift to the wife cannot be considered as a gift of the residue of the personal estate after payment of his debts, but is a general gift of all his real and personal estate not before disposed of by his will.

1892.

Nov. 23.

Dec. 14.

*Rolls Court.*  
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[ 56 ]

## GOSDEN v. DOTTERILL.

(1 Myl. & Keen, 56—60 ; S. C. 2 L. J. (N. S.) Ch. 15.)

A testator bequeathed to his sister a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to her free from all expense, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease his property consisted of 600*l.* 3 per cent. Consols, and 119*l.* in sovereigns : Held, that the stock did not pass under the words "money" (3).

Held also that under the words "free from all expense," the legacy of 100*l.* was to be paid discharged of duty (4).

THE will of John Gosden contained the following bequest :  
"I give and bequeath to my sister, Mrs. Jane Dotterill, a legacy of 100*l.* of good and lawful money of Great Britain, to be paid to my sister, Mrs. Jane Dotterill, free from all expense ; and I

(1) 20 R. R. 284 (4 Madd. 148).

12 Eq. 455, 40 L. J. Ch. 541, 24

(2) 21 R. R. 280 (5 Madd. 69).

L. T. 780.

(3) *Collins v. Collins* (1871) L. R.

(4) See *post*, p. 357.

also bequeath a legacy of 20*l.* to my nephew, John Dotterill; and the rest of my money to be equally divided, share and share alike, between my brother Joseph Gosden, and my niece Jane Penfold." The testator's property, at the time of his decease, consisted of 600*l.* 3 per cent. Consols, 119*l.* in sovereigns, 11*l.* arrears of pension due to him from Chelsea Hospital, and some household furniture, of trifling value; and the material question in the cause was, whether the stock would pass to the residuary legatees under the words "rest of my money."

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v.  
DOTTERILL.

*Mr. Jacob*, for the residuary legatees :

As the sum of 600*l.* stock constituted the bulk of the testator's property, there can be no doubt that he used the word "money" in its popular sense, and not as distinguished from stock; for without resort to the stock, the residuary gift of the money would have been nugatory: [He cited *Lynn v. Kerridge* (1), *Ommaney v. Butcher* (2), *Legge v. Asgill* (3), and *Kendall v. Kendall* (4).]

*Mr. Bickersteth* and *Mr. Goodeve*, *contra* :

\* \* In *Hotham v. Sutton* (5), Lord ELDON distinctly lays down the general proposition that stock does not pass by the word "money." \* \* There must be expressions in the context of a will to shew that the testator meant something more than money in order to pass stock under that word; and the cases cited on the other side are cases in which such an intention was indicated by the context. \* \* \*

[ 58 ]

*Mr. Jacob*, in reply :

In *Hotham v. Sutton* there was a deliberate contrast of "stock" and money throughout the will. \* \* In ordinary language, we might certainly say with sufficient propriety of a large fundholder, that he was possessed of a great deal of money. If the testator's expression be not technically accurate, it is sufficiently so in this case to place his intention beyond all doubt, and that intention the Court will effectuate.

[ 59 ]

(1) 1 West's Rep. 172.

(4) 28 R. R. 125 (4 Russ. 360).

(2) 24 R. R. 42 (T. & R. 260).

(5) 10 R. R. 83 (17 Ves. 319).

(3) 24 R. R. 51 (T. & R. 265, n.).

GOSDEN THE MASTER OF THE ROLLS:

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I have no doubt that it was the intention of this testator that the stock should pass under the term "money;" but if it be settled that stock shall not pass under the term "money," unless there be some explanatory context in the will, I am afraid that the testator's intention will not be effectuated; for here there is no such explanatory context. I will, however, look into all the authorities before deciding this case. As to the state of the testator's property, that is never referred to in aid of the construction of a will, because the will speaks at the death of the testator; and when a testator makes his will, it is uncertain what the state of his property may be at his decease.

Dec. 14. THE MASTER OF THE ROLLS:

[ \*60 ]

I was desirous of looking into the authorities before deciding the case; and I find the authorities confirm \*the impression I had at the hearing of the cause, that the term "money" will not pass stock, unless there is in the will some explanatory context; and here is no explanatory context.

*Mr. Jacob* suggested that it was questionable whether the legacy to *Mrs. Dotterill* was given to her free of legacy duty, under the words "free from all expense," inasmuch as the expression was capable of reference to expenditure attending the payment.

His Honour was of opinion that the legacy was to be paid discharged of the duty.

1832.  
Nov. 23, 24,  
26.  
Dec. 12.  
1833.  
June 20.  
Nov. 16.  
Dec. 20.

Lord  
BROUGHAM,  
L.C.  
[ 61 ]

## WALBURN v. INGILBY.

(1 Myl. & Keen, 61—87; S. C. Coop. temp. Brough. 270; 3 L. J. (N. S.)  
Ch. 21.)

Where books and papers, the joint property of the defendants and of other persons not before the Court, were admitted by the answer to be in the custody of a third party, as the common agent of all, an order was made upon the agent to permit an inspection by the plaintiff, against the consent of those owners who were not parties, on the

principle that the Court has a right to give the plaintiff whatever access the defendant himself would be entitled to (1).

An application to stay the execution of the order for production, pending an appeal to the House of Lords, against the order, was refused with costs (2).

WALBURN  
v.  
INGILBY.

[In this suit the defendants, by their answer, admitted that certain books and documents which were the joint property of them and others (who had originally been co-defendants in the suit but had successfully demurred to the bill), and related to the matters stated in the bill, were in the custody of their solicitor, Mr. Gregson, as the agent of the parties entitled thereto;] an order was made by the VICE-CHANCELLOR that the plaintiff should have those papers and documents produced, and have liberty to inspect them in the usual way.

[ 79 ]

The *Attorney-General* moved to discharge the VICE-CHANCELLOR'S order.

1833.  
June 20.

*Sir E. Sugden*, for the plaintiff, opposed the motion.

As the main topics of argument used on both sides were more fully urged afterwards in the application to stay execution of the order, pending an appeal to the House of Lords, it is unnecessary to repeat them here.

The LORD CHANCELLOR refused the motion with costs.

A motion was now made on behalf of the defendants, that all proceedings to enforce production of the books and documents in question might be stayed pending an appeal which had been presented to the House of Lords against the order directing them to be produced.

Nov. 16.

The *Attorney-General* and *Mr. Wigram*, for the motion :

\* \* In support of the present application it is enough to shew, first, that a *bonâ fide* and substantial appeal has been presented to the House of Lords, against the order by which the production is directed; and, secondly, that the enforcement of

[ 80 ]

(1) Questioned, *Kearsley v. Philips* (1882) 10 Q. B. D. 36, 465; 52 L. J. Q. B. 8, 269; 48 L. T. 468. (2) Discussed, *Bradford v. Young* (1884) 28 Ch. D. 18; 54 L. J. Ch. 368; 51 L. T. 550.

WALBURN that order would, as matters now stand, occasion serious and  
r.  
 INGILBY. irreparable mischief. \* \* \*

[ 81 ] *Sir E. Sugden* opposed the application.

*Dec. 20.* THE LORD CHANCELLOR :

[ \*82 ] This was a motion to stay, pending an appeal to the House of Lords, the execution of an order obtained on \*the 20th June last, calling upon four of the defendants, Messrs. Tennyson, Russell, Lousada, and Thiselton, to produce and give to the plaintiff access to the books and papers set forth in a schedule to their answer, and admitted by them to be in the possession and custody of Mr. Gregson, who is also admitted by them to be their solicitor. It is further admitted by them, that those books and papers relate to the matters in the plaintiff's bill. Thus far, then, nothing seems to be more of course than the granting the usual inspection. But it was resisted on the ground that several of the other defendants had demurred to the bill; that their demurrer had been allowed some months before the order was made; and that Mr. Gregson held the documents in question for them, as well as for the defendants who had answered, and against whom the application was made.

It is, however, to be observed, that not one of the defendants who resist the production takes upon himself to swear absolutely that he has not the power of producing. What they state is as if a party were to say, he could not produce papers because they were in his solicitor's hands, a statement which plainly could not protect him. The defendants' answer states that Mr. Gregson has the custody, as their solicitor, and also as the solicitor of the other defendants; and their affidavits state that the documents are in his custody, he being their solicitor in the cause, as well as the solicitor of others whose demurrer has been allowed; and that he, Gregson, objects to produce them, on account of a notice given him by two of the defendants who had demurred; and so, argumentatively, and by way of inference, that under the circumstances, the parties are unable to produce them. An affidavit to the like effect was also made by Mr. Gregson, admitting that he held the documents as solicitor in the cause for all the parties,

as well those who continued such, as those whose demurrer \*had been allowed. It is also sworn that some of the latter have other solicitors in their employ besides Gregson, and that through those other solicitors they have given Gregson notice, as their solicitor, not to produce the documents.

WALBURN  
c.  
JINGILBY.  
[ \*83 ]

If such a defence, or such an arrangement among parties having a common interest in books and papers, were allowed to protect them against production, it is clear that means would never be wanting to evade or to defeat the jurisdiction of the Court. The whole affair has essentially the appearance of a contrivance for this purpose, and it can never be suffered to prevail. One party elects to demur; another thinks it for his advantage to answer; both employ one solicitor in the cause, who holds the documents relating to it for both; but the defendant, who demurs, employs another solicitor, to give his solicitor in the cause notice not to produce these, and the defendant who answers says, that his co-defendant, being no longer a party, has, by his private solicitor, given notice to the common solicitor not to produce the papers which are their common property, and to which both have the same title. Such an excuse cannot be admitted. The Court has a right to give whatever access the party himself is entitled to, and as Gregson could not refuse access to the defendants who have answered, so cannot they refuse access to the plaintiffs. With respect to Mr. Gregson, he is quite safe in acting as the order of the Court has called upon his clients to do and to permit.

[Upon the general question of staying execution pending an appeal to the House of Lords, the LORD CHANCELLOR said :]

I had every inclination originally to grant this application; and if, on conferring with others whose experience gave great weight to their opinions, I had found that any doubt was entertained upon the matter of the order, or of this motion, I should probably have stayed the execution. But even then I am not sure that I should have done right; for certainly it would be giving encouragement to vexatious appeals upon a large class of the business which occupies these Courts. Indeed were this motion granted, upon the allegation that refusing it will enable a party to do something which cannot be undone, or to

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v.  
INGILBY.  
[ \*87 ]

obtain some advantage which can never afterwards be wrested from him, it is impossible \*to conceive any case of an order for paying money out of Court, for dissolving an injunction, for appointing a receiver, in which, the same ground existing much more plainly, the same course must not be pursued. And thus the very cases where it is of the most essential importance that speedy execution should take place, the very cases in which this Court possesses its peculiar jurisdiction because of that urgent necessity, will be those in which the argument for suspending execution will be most powerful. In other and better words, in the language of Lord ELDON, the arm of the Court will indeed be palsied.

It is needless to observe, that the inconvenience which must be admitted to attend this principle, and in a great measure to render appeals nugatory, may be traced almost in the whole to the imperfect constitution of the appellate jurisdiction. If that were so constructed as to give instantaneous dispatch, then, under proper regulations (for even then some restraint would be necessary) execution might generally be staid pending the appeal. The difficulty would here be, justly to arrange those regulations, so as to prevent appeals being resorted to in all cases, and the Courts below being made merely stages for carrying causes to the last resort. But whether an appellate Court is ever likely to be obtained, so constructed as to ensure such immediate dispatch, and at the same time so composed as to obtain full confidence for its decisions, is another and a more serious question, upon which this is no place or time to enter.

I therefore feel it to be absolutely necessary that this motion should be

*Refused, and with costs.*

**BOLTON v. CORPORATION OF LIVERPOOL (1).**

(1 Myl. &amp; Keen, 88—97; S. C. Coop. temp. Brough. 19; 1 L. J. (N. S.) Ch. 166.)

1833.  
*Jan.* 23, 24.  
*Feb.* 13.Lord  
BROUGHAM,  
L.C.  
[ 88 ]

On a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants, by their answer admitted that they had in their custody and relating to the matters mentioned in the bill, divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and documents evidencing their title to the dues in question: Held, that the plaintiffs in equity were not entitled to an inspection of the cases or deeds.

THE plaintiffs, who were merchants and co-partners in Liverpool, were defendants in an action, brought by the Corporation, for the recovery of certain dues levied by the Corporation upon the traders of that town. The bill was filed for the purpose of obtaining a discovery from the Corporation in aid of the plaintiffs' defence to the action at law.

The bill among other things charged that divers cases had been lately submitted to counsel, for their opinion, touching the right of the Corporation to receive the tolls and duties, and from which, if produced, it would appear that the Corporation had no such right, and that all such cases were then in the possession or power of the defendants; and it further charged that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings, relating to the matters contained in the bill; and by which, if produced, the truth of those matters would appear.

The defendants, by their further answer, among other things, admitted that divers cases or statements had lately been submitted to counsel, by the Corporation, for their opinion on the subject of or relating to the right of the Corporation to levy and receive the dues or customs aforesaid; and that all such cases or statements were then in the possession or power of the defendants; \*that they had in the second schedule to their further answer annexed, and which they prayed might be taken as part

[ \*89 ]

(1) *Bristol Corporation v. Cox* (1884) 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. 719.

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thereof, set forth a list of such last mentioned cases or statements; but that such cases or statements so scheduled as aforesaid were prepared in contemplation of, and with reference to, the action in the bill mentioned, and with reference to this suit; and the defendants submitted that they ought not to be compelled to produce the same. However, the defendants denied that if such cases and statements were produced, it would appear that the Corporation were well aware, or had reason to believe or suppose, or that the fact was that they had no right to levy or receive such town dues, tolls, or duties, or customs, or otherwise than as aforesaid; but that, on the contrary, it would appear that the Corporation had the right as then contended for by them. The defendants further admitted that they had then, in their possession, certain grants, deeds, documents, and papers, relating to the matters aforesaid, and that they had in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents, and papers. But the defendants said that many of such grants, deeds, and documents, were the title deeds and documents evidencing and shewing the title of the Corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had in the said schedule particularized and distinguished which of the said grants, deeds, and documents were the title deeds and documents evidencing the title of the Corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts \*from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents, and papers.

[ \*90 ]

A motion was made before the Vice-Chancellor that the plaintiffs and their agents might be at liberty to inspect and take copies of the cases or statements and documents mentioned in the defendants' further answer, and in the second and third schedules thereto. The VICE-CHANCELLOR refused the application (1), except in so far as it related to certain cases submitted to

(1) Reported in 3 Sim. 467.

counsel on the defendants' behalf many years ago, and long before the present legal proceedings were in contemplation. And the motion was now renewed.

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*Mr. Pepys and Mr. Kindersley*, for the motion; and the *Solicitor-General (Sir W. Horne)*, *Sir C. Wetherell*, *Sir E. Sugden*, and *Mr. Duckworth* against it.

[The cases cited and the arguments urged by counsel in support of the application are sufficiently stated and discussed in the LORD CHANCELLOR's judgment.]

THE LORD CHANCELLOR :

Feb. 13.

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In this case, an action for tolls having been brought by the Corporation against the plaintiffs in equity, the question was touching the right of the plaintiffs, who were the defendants at law, to have certain documents referred to in the schedules to their answer, produced in aid of the defence at law; and those documents being of two descriptions, raised two separate questions; the one relating to papers of various kinds, evidencing the title of the Corporation to the town and lordship of Liverpool, and to the dues and customs in question; the other relating to cases and statements submitted to counsel in contemplation of and pending the present proceedings at law and in equity.

First, as to the documents evidencing title. I entertain the same view of this question which his Honour did when he refused the application. I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir-at-law cannot, in that character, call for the general inspection of deeds in the possession of a devisee.

In *Lady Shaftesbury v. Arrowsmith* (1), Lord LOUGHBOROUGH said, "he could not find any spark of equity for such an application

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(1) 4 R. R. 181 (4 Ves. 66).

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as that;" admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general; the party stating himself to be the heir of the body.

The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the Corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the Corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the Corporation's title and not his, and they are only his negatively, by failing to prove that of the Corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, "Prove me liable, if you can." The Corporation have certain documents which, they say, prove this liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are.

The case of *The Princess of Wales v. Lord Liverpool* (1) was cited; and it is, perhaps, a strong case. But it is a peculiar one. Lord ELDON at first refused the application, and then granted it in the special circumstances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord ELDON, in delivering judgment upon that case, \*threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps, and they might, at any rate, said his Lordship, be given up at the hearing; for an indemnity will not do; at least, that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted, that there the thing sought, and in

[ \*93 ]

(1) 19 R. R. 282 (1 Swanst. 114, 580).

substance allowed to be inspected, was not any matter collateral, but the very instrument on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His Lordship may have considered the instruments as a sort of title common to both parties; but it could only be so by the one party setting them up, and the other impeaching them on flaws discoverable by inspection. It must, however, be observed, that this was a kind of case in which, at law, inspection would have been given.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which his Honour arrived, when he refused inspection of those parts of the Corporation's title, as being theirs, and not the plaintiffs', and not common to both.

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Next with respect to the cases sought to be inspected. These are the cases laid before counsel, in contemplation of the action, and pending the proceedings. Their dates come down to the 29th of October, 1891, the bill having been filed in November, 1890, and the answer sworn in December, 1891. Most of the cases were laid before counsel after the demurrer was argued; nay, after it came before me on appeal; some of them on the very eve of the present application to the Vice-Chancellor. They are sworn in the answer "to have been prepared in contemplation of and with reference to the action and suit." It is suggested, that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspection. And whether this be so in point of fact, or not, is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause can be obtained by coming to this Court.

[ \*94 ]

It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the

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[ \*95 ]

opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into Court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which, in all likelihood, had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at \*any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers. But without such communication no person can safely come into a Court, either to obtain redress or to defend himself.

Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour we must submit. *Radcliffe v. Furman* (1) is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not shew any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the Court had no right to know any thing which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting, whether his rights had been affected by a

(1) 2 Brc. P. C. 514, Toml. ed.

certain lapse of time. And the ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties.

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So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to or in contemplation of, or pending the suit or action, for the purposes of which the production is sought.

The case of *Preston v. Carr* (1), would seem to have carried the doctrine of *Radcliffe v. Fursman*, this one most material step farther, but apparently without intending to do so, for one of the learned Judges says that he agrees with those who have expressed an opinion that it should not be carried farther.

There is, however, a decision of this Court since *Preston v. Carr*, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds, as to the authority of the noble and learned Judge who pronounced it; I mean the case of *Hughes v. Biddulph* (2). I can see no difference between the letters there excepted from the order to produce documents, and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client in the progress of the cause, or with reference to the cause before it was instituted. This was the line which Lord LYNTHURST drew, and I can see no difference between the statements of a case in such correspondence, and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence, might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental and \*cannot affect the principle; for it is clear that the case may, and in such circumstances, probably will, contain as much matter as the letters, which the client cannot safely disclose: and it may very well happen that the case prepared by the solicitor should contain more than the letters.

[ \*97 ]

(1) 1 Y. &amp; J. 175.

(2) 28 R. R. 46 (4 Russ. 190).

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LIVERPOOL.

*Vent v. Pacey* (1), which followed two years after, though reported next in the same volume, is said to throw a doubt upon *Hughes v. Biddulph*, at least as far as regards its application to this question. In the first place, however, the VICE-CHANCELLOR having acted on *Hughes v. Biddulph*, as regards the letters, his order was appealed from and affirmed. But next, it is said that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production, on the accidental ground mentioned of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am therefore, upon the whole, of opinion that cases laid before counsel in the progress of a cause, and prepared in contemplation of, and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

1833.  
Jan. 17, 31.

Lord  
BROUGHAM,  
L.C.  
[ 98 ]

### GREENOUGH v. GASKELL (2).

(1 Myl. & Keen, 98—115; S. C. Coop. temp. Brough. 96.)

On a bill which sought to charge a solicitor with a fraud practised on the plaintiffs in the course of proceedings on his client's behalf, the Court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications, made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody.

And, generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though that business had no reference to legal proceedings, either existing or in contemplation.

By an order made in the month of March, 1831, in a suit for the administration of a testator's assets, a sum of 5,000*l.* was

(1) 4 Russ. 193. Omitted from the Revised Reports for the reason here given.—O. A. S.

(2) The origin and meaning of the rule protecting confidential communications between solicitor and client as given by Lord BROUGHAM on p. 263 below is approved by

TURNER, V.-C., *Russell v. Jackson* (1851) 9 Ha. at p. 391, and by JESSEL, M.R., *Anderson v. Bank of British Columbia* (1876) 2 Ch. Div. 648; and see *Lyell v. Kennedy* (1883) 9 App. Cas. 81, 86; *In re Strachan*, '95, 1 Ch. 439, 444, C. A.—F. P.

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directed to be lent and advanced to one Thomas Darwell out of the fund in Court, upon Darwell executing a bond for double the amount, by way of security for the repayment. Under another order, dated the 26th of the following April, a sum of 1,600*l.* being part of the aforesaid 5,000*l.*, was accordingly paid to a country solicitor of the name of Gaskell, who received the money on Darwell's account, although, as was alleged, he was aware at the time that his client had not given the required security. The mistake was soon afterwards discovered, and an order made for the repayment of the money; and on Darwell failing to obey that order, an attachment issued against him, under which he was arrested. In this state of things, application was made on his behalf, to the plaintiffs, who were ultimately prevailed upon to join in signing and delivering to Gaskell a promissory note for 1,698*l.* (which sum included a balance due for costs), and Gaskell, on receiving the note, advanced the money ordered to be replaced, and his client was immediately set at liberty. Darwell became a bankrupt shortly afterwards; and the present bill was then filed against Gaskell by the persons who had joined in executing the note, for the purpose of having it delivered up to be cancelled, and for an injunction against legal proceedings in the meantime.

[ 99 ]

The bill, after setting forth in detail the circumstances above mentioned, alleged, that the plaintiffs had been persuaded to execute the note in question, at the pressing instance and solicitation of the defendant; that the more readily to induce them to sign it, the defendant had fraudulently concealed the fact, that Darwell was then in a state of insolvency, or had committed an act of bankruptcy, and had falsely represented his client's difficulties as being temporary only, although at the time the defendant made such representations, he well knew the contrary to be the truth; and that inasmuch as the note was given for the purpose of raising the money which the Court had ordered to be replaced, and that money had been originally advanced under an order improperly obtained, through the agency and management of the defendant, the defendant would himself have been held liable by the Court, if Darwell had failed to repay it; and the defendant was therefore to be considered, in equity, as the principal debtor, for whom the plaintiffs were

GREENOUGH no more than sureties. The bill moreover stated a variety of  
 GASKELL. facts, tending to shew that the defendant, who had acted for many years, and throughout the whole of the proceedings in the administration suit, and particularly upon the orders already mentioned, as the solicitor of Darwell, must have fully known the real situation and circumstances of his client.

The defendant, by his answer, wholly denied that the note in question had been executed by the plaintiffs at his instance or entreaty, but he admitted that he had been aware of the situation and circumstances of Darwell at the time of the transaction impeached by the bill; and, in answer to a charge to that effect, he also admitted that he had in his possession divers books, &c., containing entries and memorandums, and also divers papers and letters, relative to the matters in the bill mentioned; and he set  
 [ \*100 ] forth a list of them in a schedule. \*But he stated that such entries and memorandums were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for Darwell, for whom he had been professionally concerned for a number of years.

*Sir E. Sugden* and *Mr. Koe*, for the plaintiffs, now moved, by way of appeal from the VICE-CHANCELLOR, by whom the motion had been refused, that the scheduled books, papers, and letters, might be produced, and that the plaintiffs might have liberty to inspect them. The privilege which entitled solicitors to withhold a discovery of matters coming to their knowledge in the course of their professional business, was a privilege granted solely for the benefit of the client, and could never be allowed to shelter a solicitor who was sought to be personally charged with a fraud.

*Mr. Pepys* and *Mr. Spence* opposed the motion.

Jan. 31. THE LORD CHANCELLOR this day delivered the following judgment:

We are here to consider not the case which has frequently arisen in courts of equity, and more than once since I came into this Court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so, has, at different times, been a matter of controversy. And in two cases before Lord Lyndhurst (1), and

(1) *Hughes v. Biddulph*, *Vent v. Pacey*, see *ante*, pp. 257, 258.

one since I sat here (1), the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in \*contemplation. But the party has no general privilege or protection; he is bound to disclose all he knows, and believes, and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself.

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[ \*101 ]

Here the question relates to the solicitor, who is called upon to produce the entries he had made in accounts, and letters received by him, and those written (chiefly to his town agent) by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters, or entries made by him in that capacity. To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.

As regards them, it does not appear that the protection is qualified by any reference to proceedings pending \*or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a

[ \*102 ]

(1) *Bolton v. Corporation of Liverpool*, ante, p. 251.

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communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications;—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. "It would be most mischievous," said the learned Judge in the Common Pleas, "if it could be doubted whether or not an attorney, consulted \*upon a man's title to an estate, was at liberty to divulge a flaw (1)."

[ \*103 ]

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

(1) See 22 R. R. 640 (2 Brod. & J. probably here referred to, differs B. 6). [The judgment of BURROUGH, from the above quotation.]

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But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources ; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. From the terms in which I have stated the proposition, it is manifest that several cases may arise, which, though apparently they are exceptions, yet do in reality come within it. Thus the witness, or the defendant treated as such, and called so to discover, must have learned the matter in question only as a solicitor or counsel, and in no other way : if therefore he were a party, and especially to a fraud (and the case may be put of his becoming informer after being \*engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing ; for in such a case his knowledge would not be acquired solely by his being employed professionally. So if you examine the cases in which the protection has been refused, until the late *Nisi Prius* cases (of which I shall presently speak more in detail), you will find that they all range themselves within one or other of the following heads, which are deducible from the proposition and in strict consistency with its terms. Those apparent exceptions are, where the communication was made before the attorney was employed as such, or after his employment had ceased ; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend ; or where there could not be said, in any correctness of speech, to be a communication at all ; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of

[ \*104 ]

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his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases) ; or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure ; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted ; or where the attorney made himself a subscribing witness, and thereby assumed another character for the occasion, and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, \*matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.

[ \*105 ]

I shall first advert to the cases which support the proposition, and then shew that those referred to as impugning it, previously to the year 1819, come plainly within its terms on one or other of the grounds I have just stated. In a case in *Skinner* (1), a *Nisi Prius* case, but before Lord Holt, an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was examined to prove it a corrupt one ; but the LORD CHIEF JUSTICE held him not bound to answer ; and it is to be observed that the only ground there taken against the privilege was his not being a counsellor, and Lord Holt said, "it seems to be the same law of a scrivener," as, indeed, Lord Nottingham had laid down in *Harvey v. Clayton* (2) many years before, where he would not compel a scrivener to discover whose money he held in trust or for whom, saying, that if he did, no man could hereafter employ him, and that a man shall not be wounded through the side of his scrivener. In *Gainsford v. Grammar* (3), Lord Ellenborough would not allow an attorney to be examined touching a proposal which he had carried from his client to the plaintiff, though no suit was then pending nor in existence for several months after. His Lordship gives apparently as a reason for considering that

(1) *Anon.*, p. 404.

(3) 11 R. R. 648 (2 Camp. 9).

(2) 19 R. R. 66 (2 Swanst. 221, n.).

the witness was acting as an attorney, and not as an ordinary agent (the argument on the other side), that an attorney might be retained and confided in, in contemplation of a suit, but he appears to rely simply upon its being a communication made to him while professionally employed as an attorney. GREENOUGH  
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This was clearly the opinion of Lord ELLENBOROUGH in other cases, of which two are reported in the fifth volume of Espinasse's Reports. In *Robson v. Kemp* (1) a solicitor being called who had been employed in preparing a warrant of attorney, and who had subscribed it as a witness, Lord ELLENBOROUGH held him not bound to answer any question touching what passed at the concoction and preparation of the instrument, for those circumstances were confided to him professionally; and his Lordship observed, that by subscribing as a witness he had only pledged himself to give evidence as to its execution. Neither would he allow him to be examined as to its destruction, the attorney having become acquainted with that only in his professional capacity, and his Lordship concluded that the "one case was as much privileged as the other." And so in *Brard v. Ackerman* (2), the same eminent Judge would not allow an attorney to be examined as to the particulars of a bill of exchange which had come into his possession from his client. If it be possible that this bill might have been delivered to him *post litem motam*, it is at least quite clear in the former case that the transaction had no connection whatever with any suit commenced or in contemplation, for no one can maintain without a great perversion of terms, that the warrant to confess judgment referred to a suit in the sense in which the term is used throughout the present argument. [ 106 ]

The case of *Cromack v. Heathcote* (3) is the only other authority to which it is necessary to refer. It is clear and distinct, and is the only decision in Bank upon the question. An attorney was there called to prove fraud in an assignment, he having been asked by the party against whom he was called, to prepare the deed, \*which he had refused to do, and another had then been employed. The cases were all considered, and the Court held that because the party consulted the attorney professionally, and [ \*107 ]

(1) 8 R. R. 831 (5 Esp. 52).

(3) 22 R. R. 638 (2 Brod. &amp; B. 4).

(2) 5 Esp. 119.

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instructed him as an attorney, although after receiving such communication the latter refused to draw the deed, yet the knowledge he had was obtained in his professional capacity, and they were unanimously of opinion that there being no suit pending in any Court made no difference as to the protection. Mr. Justice RICHARDSON expressly puts the case of an attorney consulted on title, and says he never heard of the rule being confined to attorneys employed in a cause.

I have only adverted to such of the cases allowing the protection as maintain the proposition in its largest extent, and distinctly exclude the qualification of late partially introduced, of reference to legal proceedings.

But it will now be satisfactory to examine the cases in which the protection has been refused, and to find that down to *Wadsworth v. Hamshaw* (1) they afford no real exception to the rule, but come within the description already given of exceptions only in appearance. Indeed the greater part of them afford strong confirmation of it in the *dicta* of the Judges as to how the decisions would have gone had the facts been otherwise.

In *Cuts v. Pickering* (2) where the defendant had disclosed to A. B. an erasure in a will to have been done by him, but disclosed it before A. B. was his solicitor, it was held he might be examined, but *secus*, had the disclosure been after his retainer. *Lord Say's* case (3) was that of an attorney employed in levying a fine, and called to prove that the deed to lead the uses was not \*executed till five months after the date. The Court agreed that he could not be examined to prove his client's secrets, but that the execution of a deed was a fact that he might know *aliunde*, and not a secret of his client's. But here no distinction was taken as to matter disclosed in a suit, or preparatory to, or connected with a suit, and other secrets or secrets otherwise learned. In *Studdy v. Saunders* (4), an attorney's clerk was allowed to identify the client as the person who put in an answer, on the ground that this was a matter not confidentially disclosed to him. *Contrà*, in *Rex v. Watkinson* (5), which was an indictment for perjury assigned in

[ \*108 ]

(1) 22 R. R. 639, n. (2) Brod. & B.  
5, n.).

(2) 1 Vent. 197.

(3) 10 Mod. 40.

(4) 2 Dowl. & Ry. 347.

(5) 2 Strange, 1122.

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an answer in Chancery, where the Master who took it could not identify the defendant, the solicitor who was present when it was sworn, was called, and as the CHIEF JUSTICE would not compel him to give evidence, the defendant was acquitted. Yet there the identity must have been known to many others, and the putting in the answer so far from being a secret disclosed, was in its very nature a matter of publicity. This case then I take not to be law at the present day. Indeed, Lord MANSFIELD says in *Doe v. Andrews*, he has known an attorney examined to prove that his client swore and signed an answer on which the latter was indicted for perjury. In *Doe v. Andrews* (1), in consequence of an attorney who was an attesting witness to an agreement, refusing to prove it, there was a nonsuit. But the Court afterwards set aside the nonsuit, holding that the attorney was bound to give evidence on collateral points, and that whoever becomes a witness to an instrument pledges himself to give evidence on it whenever called upon. There the attorney had been mixed up with the transaction, and had acted not as a \*professional man: for though attorneys often witness deeds, that is accidental, and they do so not as attorneys. He had made himself, as Lord ELLENBOROUGH says in one of the *Nisi Prius* cases, “a public man” as to proving the execution, and not an attorney. *Cobden v. Kendrick* (2) was the case of a communication from client to attorney after the action was compromised, and it was held not privileged: clearly, because it was not made professionally, but by way of idle and useless conversation, the words being, “I am glad it has been settled, for I only gave 10*l.* and my note; it was a lottery transaction.” Had this been confided with a view to some further proceedings, or, without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected. In *Duffin v. Smith* (3) usury in a mortgage was proved by the plaintiff’s attorney who prepared the deed, and who was called by the defendant to prove the consideration usurious; and Lord KENYON in that case said, that “when the attorney himself is as it were a party to the original transaction, that does not come to his knowledge in the character of an

[ \*109 ]

(1) Cowp. 845.

(3) 1 Peake, 146.

(2) 2 R. R. 424 (4 T. R. 431).

GREENOUGH attorney, and he is liable to be examined the same as any other  
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[ \*110 ]

It may be doubted if the attorney preparing the deed be not confidentially entrusted as an attorney in so doing. But Lord KENYON proceeds upon the assumption that he is not; that on the contrary he is *quasi* party, and he seems to liken the case to that of a co-conspirator, where clearly there is no protection. Had he not deemed him the party acting, rather than the attorney entrusted, the principal rather than the agent, it is plain that his Lordship would have held him exempt from interrogation. In *Wilson v. Rastall* (1), an attorney was held \*compellable to produce letters committed to him by the wife of another witness, who had, he said, consulted him in his profession as a confidential person, both before and after the wife gave him the letters; the letters, though not given by him, were kept with his privity and consent; and the witness himself said, that they were committed to him in consequence of the defendant consulting him professionally. But then he also said that he was under-sheriff, and had, on this account, refused to be employed as an attorney. And, therefore, all that could be said was, that he had been confidentially consulted by a friend, who selected him for this purpose because of his professional knowledge. The Court, and particularly BULLER, J., put the decision upon this ground, that the letters were not given to him in his professional capacity.

So stand the authorities on both sides, or I should rather say, all substantially on one side, previously to the year 1819; the date of the first case I can find, in which the rule was laid down with the qualification that the communication must relate to a cause. That is also the case in which the qualification is stated the most largely, or with the greatest effect upon the rule.

The case I allude to, is a *Nisi Prius* decision of Lord TENTERDEN at Guildhall, *Wadsworth v. Hamshaw*, given in a note to *Cromack v. Heathcote* (2). The question was, whether the defendants were partners at the time when certain goods were delivered, and their attorney was produced by the plaintiff to prove that they had called upon him to advise them professionally respecting the

(1) 2 R. R. 515 (4 T. R. 753).

(2) 22 R. R. 639 (2 Brod. & B. 5).

dissolution of their partnership. The LORD CHIEF JUSTICE considered that this was not a privileged communication, holding that the protection \*extended to those communications, which relate to a cause existing at the time of such communication, or then about to be commenced, and he cited a case from the Midland Circuit, which came on motion into the King's Bench, a case to which he frequently referred upon questions of this kind, and of which a better account is to be found in *Clark v. Clark* (1). Lord TENTERDEN, as I have often heard him say, was disposed to hold this privilege more strictly, that is, to allow it more sparingly than other Judges; indeed, he makes a similar remark in one of the cases reported, but in none did he ever lay the rule down with so large an exception as here, and from what he afterwards says in *Clark v. Clark*, it can hardly be doubted that the report makes him restrict the privilege more than he intended.

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[ \*111 ]

It would follow from the decision in *Wadsworth v. Hamshaw*, if the words are to be taken literally, that a communication, however confidential, made to a professional man, with a view to the client's defence against any proceedings which might be commenced, would be without protection, because the disclosure was not on the eve of the suit.

The same doctrine is re-affirmed, though not, perhaps, quite so largely, in *Williams v. Mundie* (2). That also was a case at Guildhall, occurring a few years after the former (in 1824), from which it only differs, inasmuch as the attorney was consulted by the defendants relative to the commencement, and not to the dissolution of the partnership, which, as before, was the matter in question. And here Lord TENTERDEN allowed the examination, but stated the rule somewhat less strictly against the protection. "I have invariably laid down," says his \*Lordship, "that what is communicated for the purpose of bringing an action or suit relating to a cause, or suit existing at the time of the communication, is confidential and privileged, but what any attorney learns otherwise than for the purpose of a cause or suit he is bound to communicate."

[ \*112 ]

It may be fairly said, taking these two cases together, that his Lordship would not have excluded communications made with

(1) 2 Moo. & Mal. 3.

(2) Ry. & Mood. 34.

GREENOUGH v. GASKELL. a view to legal proceedings, though none such had either been commenced or were about to be instituted. Lord WYNFORD, who, in *Broad v. Pitt* (1), adopts the doctrine, appears so to understand the case, for he says it is enough if a proceeding is instituted or apprehended. In the case before him, however, though Lord WYNFORD approves of the rule, no decision can be said to have been made, for the counsel for the plaintiff preferred proving their case by other evidence not open to the same objection, and did not press for the disclosure, although the Court had ruled that they might have it.

When a Judge of such eminence as Lord TENTERDEN states that, "the question is one to which he has given great consideration (2)," even the contrary current of other decisions would leave the Court under considerable anxiety in departing from so high an authority; and it is therefore very material to inquire if the opinion ascribed to his Lordship has not been either reported by others, or propounded by himself in the course of *Nisi Prius* proceedings, with somewhat of looseness, or, which would be as satisfactory, to ascertain that he was subsequently disposed to modify that opinion, supposing it to have been accurately represented in the first instance.

[ 113 ] In *Clark v. Clark* (3), the attorney was called to prove a communication with him, when consulted upon a transaction, for the purpose of shewing that transaction to be fraudulent. A dispute had arisen between the parties, but there were no proceedings pending, nor, it should seem, in preparation or contemplated. The plaintiff only consulted his attorney as to his rights, and put one of the documents connected with the transaction into his hands to get it stamped. Lord TENTERDEN held that the protection extended to this case. His Lordship upon that occasion, referring to the reports, intimates an impression as existing in his mind that he had been made to state the rule more narrowly than he was likely to have laid it down; he allows that he has been more inclined to restrict it than other Judges, and refers again to the case from the Midland Circuit, in a way which proves that case to have gone on the undeniable

(1) 1 Moo. & Mal. 234.

(2) Ry. & Mood. at p. 35.

(3) 2 Moo. & Mal. 3.

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proposition that the communication, to be protected, must be made to the attorney in his professional capacity; and he concludes by holding the communication in the case before him to be privileged, because it was made to the attorney in his professional character, with respect to a matter then in dispute, although no cause was in existence with respect to it.

But the distinction here taken between dispute and no dispute having arisen, cannot be found in the cases; and neither Lord TENTERDEN himself, nor the rest of the Court of King's Bench, could have taken it into their consideration in *Bramwell v. Lucas*; for, if so, it would have put an end to the question there, and have precluded the necessity of a very difficult and nice inquiry as to the nature of the communication. The question related to an act of bankruptcy; and though bankruptcy, when proceeded upon, may be considered as a suit, yet \*the act itself, out of which the proceedings may arise, is nothing of the kind; nor could any dispute be said to exist, for the fact happened before the parties to the dispute, the assignees and petitioning creditor, could have any existence.

[ \*114 ]

This case of *Bramwell v. Lucas* closes the examination of the authorities, which I have felt called upon to institute; and it not only proves nothing against the general doctrine on which I have rested my opinion, but it comes distinctly within the principle stated, and ranges itself with all the rest of what I have termed the only apparent exceptions.

In *Bramwell v. Lucas* (1), an attorney of the name of Scott was called to prove his client's act of bankruptcy, by relating that a meeting of creditors having been appointed, the client Noakes asked them if he (Noakes) could safely attend without being arrested; and Scott advised Noakes to remain in his office till he could ascertain that they would give him safe conduct, and that Noakes accordingly remained two hours there to avoid arrest. Lord TENTERDEN, in delivering the judgment of the Court, says that the privilege is confined to communications made to an attorney, in his character of attorney, and that this was a question which might have been asked of any one else, and the information or advice might have been given by any one

(1) 2 B. &amp; C. 745.

GREENOUGH else as well as by an attorney; "he recommended Noakes, not  
 GASKELL, as a legal adviser, but as any agent or any friend might have recommended him, to stay where he was till a certain matter of fact could be ascertained."

[ \*115 ] This decision, therefore, went upon the ground that the communication which passed between the parties was \*not professional, as regarded the attorney. There may be some doubt whether the view of the fact taken by the Court was not somewhat bottomed in a refinement,—whether the communication with Noakes was, in point of fact, in Scott's professional capacity. But the doctrine of law laid down in the case is free from all doubt: it is, that the privilege shall be excluded, where the communication is not made or received professionally and in the usual course of business.

The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are the same on both sides of the Hall; the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same. Nor do I believe that there will be found any difference of opinion upon the question in the different Courts.

[In Lord Denman's copy of 1 Myl. & K. the following note is added at the foot of this case.—O. A. S.]

The CHANCELLOR consulted TINDAL, Ch. J., Lord LYNDEHURST and myself on this subject, and we all agreed in the same view of the doctrine.

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### WILSON v. MOORE (1).

(1 Myl. & Keen, 126—147; affirmed, 1 Myl. & Keen, 337—362.)

The commercial correspondents of executors, acting under a power of attorney, held to be responsible to the testator's estate for the amount of the produce of stock, part of the estate, sold by them, and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents with full knowledge, on the part of the correspondents, that the stock was part of the testator's assets.

There is no primary liability in respect of breaches of trust, all parties

(1) *Child & Co. v. Thorley* (1880) 16 Ch. D. 151.

1832.  
 Dec. 17, 18.  
 1833.  
 Feb. 12.  
 ———  
*Rolls Court.*  
 LEACH, M.R.  
 On Appeal.  
 1834.  
 March 11, 12.  
 14, 15, 22.  
 ———  
 Lord  
 BROUGHAM,  
 L.C.  
 [ 127 ]

to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to the breach of trust.

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Where a Scotch sequestration had issued against a testator's heir, and it was necessary in a suit to have the testator's real representative before the Court; the trustee under the sequestration, who was named as a defendant to the suit, and stated to be out of the jurisdiction, was held to be a sufficient representative of the testator's real estate.

Merchants, who, by the direction of an executor, their commercial correspondent, applied a fund, which they knew to be part of the testator's assets, in satisfaction of advances made by them, in the course of trade, to relieve the embarrassments of their correspondent, were held to be responsible for the fund so applied, to general pecuniary legatees under the will of the testator.

Affirmed upon appeal.

[THIS was a suit] by the younger children of the testator, John Crawford, who were pecuniary legatees under his will, which was made in the Scotch form, and by the husbands of such of them as, being daughters, were married, against the personal representatives of Joseph Marryat the elder, deceased, Joseph Marryat the younger, and [Jane Tucker Crawford,] the widow and three eldest sons of the testator, who were executrix and executors under his will, and who, being resident in Scotland, were alleged to be out of the jurisdiction of the Court. The bill \* \* prayed that the defendants, the representatives of Joseph Marryat the elder, and the defendant, Joseph Marryat the younger, might replace and make good to the estate of the testator, John Crawford, the two principal sums of 19,895*l.* Navy 5 per cent. Annuities, and 14,000*l.* Irish 5 per cent. Bank Annuities, and the sum of 2,078*l.* 10*s.* 3*d.* cash, and that the same \*sums of stock and cash might be applied under the will of the testator in a due course of administration.

[ \*128 ]

The testator, by his will dated the 19th of April, 1811, gave to his wife certain property absolutely, and the interest for life in all other his property real and personal, and after her death he directed his real or heritable property to be divided between his sons, in manner therein mentioned, and gave certain pecuniary legacies to the plaintiffs, his younger children, and made all his sons his residuary legatees, and appointed his wife Jane Tucker Crawford, and his sons James Crawford, Andrew Crawford (who died in 1825 intestate

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and insolvent), and Joseph Tucker Crawford, his executrix and executors.

The testator for some time carried on the business of a merchant at Port Glasgow and in Newfoundland, in partnership with his three sons, James, Andrew, and Joseph, under the firm of John Crawford & Co. On the 16th May, 1810, the testator retired from the partnership, and the business was subsequently carried on by his three sons under the same firm; but the public notice of dissolution, required by the Scotch law, was not given.

The testator died on the 3rd of August, 1813.

Joseph Marryat the elder, who was in partnership with his son Joseph Marryat the younger (the latter of whom had little or no personal knowledge of the transactions which formed the subject of this suit), had for some years previously to 1813 been the correspondent and agent in London of the firm of John Crawford & Co. He had, also, during the same period been the agent of the testator in his separate capacity, and had \*in that character, by virtue of a power of attorney, been in the habit of receiving the dividends on the two sums of stock mentioned in the prayer of the bill, which were the separate property of the testator; and in respect of such dividends the firm of Marryat and Son kept a separate account with the testator, and the sum of cash mentioned in the prayer was alleged to be the balance of such separate account.

[ \*129 ]

On the 22nd of October, 1813, James Crawford, the eldest son of the testator, remitted to Joseph Marryat the elder, the testator's will, with a request that he would give the necessary instructions for proving it in the Court of the Bishop of London. Mr. Marryat accordingly took the necessary steps for procuring probate of the will, which was granted, on the 11th of November, 1813, to James Crawford, Andrew Crawford, and Jane Tucker Crawford, the widow. Joseph, who was at that time abroad, did not prove the will.

On the 7th of January, 1814, James Crawford remitted to Joseph Marryat the elder two powers of attorney, dated on that day, executed by the widow, and the two sons, James and Andrew, which authorised Joseph Marryat the elder, not only to receive the dividends, but to sell the sums of stock before

mentioned; but in the letter of James Crawford, which inclosed the powers of attorney, it was stated that they were sent to Mr. Marryat, to enable him to receive the dividends, which he was requested to place to the credit of the testator's estate with Joseph Marryat and Son.

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On the 19th of January, 1814, a meeting of all the members of the family of John Crawford, the testator, interested under his will, took place in pursuance of certain directions contained in the will; at which meeting \*a minute was signed by all the parties present, whereby it appeared that the real property of the testator amounted to 50,712*l.*, and the personal property to 40,092*l.*; and it was agreed that James Crawford should take the management of the testator's estate, as acting executor.

[ \*130 ]

Messrs. Marryat and Son continued, after the death of the testator, to be the correspondents of the sons, trading under the firm of John Crawford & Co., and from time to time accepted bills drawn on them in the name of that firm, to be provided for by remittances in the usual course of commercial agency.

On the 21st of March, 1814, Messrs. Marryat received a letter, signed by the firm of John Crawford & Co., who had extended their commercial speculations by the establishment of a house at Lisbon, stating that, from the conduct of the Regency of Portugal, they had been deprived of funds, which they expected from thence, and requesting that they might be permitted to draw upon Messrs. Marryat at three months for 5,000*l.* or 6,000*l.*; and this permission was given by Messrs. Marryat.

On the 4th of May, 1814, Messrs. Marryat sent their account to John Crawford & Co.; by which it appeared that the balance then due to them, taking credit for their acceptances, was 3,188*l.* 9*s.*

About this time, the firm of John Crawford & Co. applied to Messrs. Marryat to give a credit to their Lisbon house; and Messrs. Marryat having complied with that request, John Crawford & Co. expressed their obligations for that accommodation by a letter to Messrs. Marryat, dated the 14th of May, 1814.

On the 17th of May, 1814, John Crawford & Co. wrote a letter to Messrs. Marryat, giving notice that they had drawn two bills

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WILSON for 2,000*l.* each on Messrs. Marryat, and requesting them to sell  
 MOORE. 10,000*l.* stock in the Irish or Navy Annuities, as they should think best, and to hold the proceeds at their disposal.

On the 21st of May, 1814, Messrs. Marryat wrote to John Crawford & Co., stating that they would watch the stock market, and would sell the 10,000*l.* at the first favourable opportunity; adding, "With respect to the proceeds, the more regular way would be to credit your father's estate, in the first instance, and afterwards, to transfer to your account, on your forwarding to us an order from the executors to do so." Messrs. Marryat accordingly sold the sum of 10,000*l.* Navy 5 per cent. Annuities for a sum of 9,711*l.* 6*s.*, and, on the 28th of May, 1814, James Crawford wrote a letter to Messrs. Marryat, signed by him as acting executor for his father, requesting them to transfer the 9,711*l.* 6*s.* to the account of John Crawford & Co.

[Further transactions of a similar character took place, in the course of which large advances were made by Messrs. Marryat to John Crawford & Co., which were partly recouped by the sale of the remainder of the Navy and Irish Bank Annuities.]

[ 137 ] The commercial connection between Messrs. Marryat and John Crawford & Co. continued until the latter became bankrupts, in February, 1826; when the debt due from them to Messrs. Marryat amounted to upwards of 20,000*l.*, after giving them credit for the produce of the stock. A sequestration, in the Scotch form, issued against them, and William Bennett was duly appointed trustee under the sequestration, and in that character acquired the legal interest in the testator's real estates; which, by a decree of the Court of Session in Scotland, affirmed upon appeal by the House of Lords, were adjudged to be sold by Bennett, and were declared to be in the first place applicable to the payment of the unsatisfied debts of the testator, which were stated to exceed the value of the estates.

[ \*138 ] The widow of the testator proved under the sequestration, as a creditor of John Crawford & Co., for the \*amount of the stock sold, and received a dividend of 8*s.* 4*d.* in the pound.

The cause first came on to be heard before the Master of the Rolls, on the 17th of March, 1829; when an objection was taken that the widow of the testator, who was his sole solvent repre-

sentative, was not actually before the Court, but merely named as a defendant, and stated to be out of the jurisdiction. The MASTER OF THE ROLLS being of opinion that, if the claim of the plaintiffs succeeded the amount recovered by them must be applied in a due course of administration, and that the executrix was therefore to be considered as an active, and not as a passive party, allowed the cause to stand over, with liberty to amend by adding parties.

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A bill of revivor and supplement was afterwards filed, the revivor becoming necessary upon the death of Thomas Wilson, the surviving executor of Joseph Marryat the elder, in order to bring the representatives of the former before the Court. The supplemental part of this bill stated the proceedings in Scotland under the sequestration, and in relation to the administration of the assets of the testator John Crawford, and the proceedings in the House of Lords upon the appeal from the decision of the Court of Session. It charged that Jane Tucker Crawford and Joseph Tucker Crawford were still out of the jurisdiction of the Court, and that Jane Tucker Crawford was in collusion with the defendants, and refused to institute proceedings against them for the purpose of compelling the replacement of the sums of stock in question. William Bennett, the trustee under the sequestration, was named as a defendant, and stated to be out of the jurisdiction of the Court.

To this bill James Crawford appeared, and Jane Tucker Crawford appeared, and put in an answer, whereby \*she denied collusion, but admitted that she had not instituted any proceedings against the defendants for the purpose of compelling the re-investment of the sums of stock in question, though she had been requested to do so.

[ \*139 ]

*Mr. Pemberton and Mr. Stuart for the plaintiffs:*

The estate of Marryat and Son is clearly answerable for the value of the stock sold out by that firm without due authority, and with the full knowledge that the stock was the property of the testator. The general principle upon which this liability rests is, that a person who deals with an executor in respect of property which he knows to be part of the assets of the testator,

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and which he receives with notice, direct or implied, that such property is applied to the private purposes of the executor, cannot hold money so possessed against creditors or general legatees under the will: *Hill v. Simpson* (1). [In *M'Leod v. Drummond* (2),] the language of Lord ELDON, in his judgment upon that appeal, is certainly strong to shew his opinion in respect of the general right of all legatees, whether pecuniary, specific, or residuary, to follow the assets of the testator, where they have been misapplied by the executor. \* \* In *Keane v. Roberts* (3), this principle is established upon grounds which are directly applicable to the circumstances of this case, and which leave no doubt as to the liability of the defendants.

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[Here, there is evidence which fixes Mr. Marryat the elder with the knowledge of the misapplication of the fund, and consequently renders him a party to the breach of trust: *Watkins v. Cheek* (4).]

*Mr. Bickersteth* for the representatives of the surviving executor of Joseph Marryat the elder :

The objection for want of parties, which applied to the original bill, is equally applicable to the suit in its present form. \* \* This is a suit instituted by legatees against persons alleged by them to be debtors to the estate of John Crawford, without bringing before the Court the persons who are to administer that estate. Bennett is the representative of the testator's real estate ; he is therefore an indispensable party to the suit, and being out of the jurisdiction of the Court, he is not, for the purpose of this suit, a party. \* \* No relief is prayed against Jane Tucker Crawford : she is alleged, indeed, in the bill to have colluded with Marryat, and refused to sue ; and by her answer she denies that she colluded, but admits that she refused to sue. If any breach of trust has been committed, she is the party who authorised it by executing the power of attorney : she is the party primarily liable ; yet no relief is prayed, nor can any decree be made against her.

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\* \* \* \* \*

(1) 6 R. R. 105 (7 Ves. 152).

(3) 20 R. R. 306 (4 Madd. 332).

(2) 11 R. R. 41—46 (17 Ves. 152—169).

(4) 25 R. R. 181, 185 (2 S. & S. 199, 205).

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On the following day his Honour delivered his opinion upon this point to the following effect :

A question has been made, whether this suit is so framed in respect of the parties brought before the Court, that the Court can proceed to consider the questions raised by the bill ; and I am of opinion that the suit is well framed for that purpose. The bill is filed by legatees under the will of the testator, John Crawford, against persons alleged to be debtors to the estate of the testator. Mrs. Crawford, the personal representative of the testator, refuses to concur in this suit ; and, where the personal representative of a testator refuses to sue, any person beneficially interested in the assets has a right to institute a suit in respect of such assets. The defendants being alleged to be debtors to the testator's estate, the claims of the plaintiffs upon the assets, if established, must be satisfied in a due course of administration ; the question is, therefore, whether there are before the Court the necessary parties for the due administration of the testator's estate. I have read the proceedings in the Scotch suit ; and it appears to me that Bennett, who is made a defendant, is now the person in whom the real estate is vested. There is, consequently, the proper person before the Court in respect of the administration of that part of the estate. With respect to the personal estate, there are the executor, one of the sons who has become bankrupt, and the widow, the executrix, who is not a bankrupt, but who proved against the son's estate under the sequestration. All the proper parties, therefore, are before the Court. It has been said that no decree can be made, in this suit, against the representatives of Mr. Marryat, since the party primarily liable is a defendant, against whom no \*relief is prayed : but it is a misapprehension to suppose that any persons concerned in a breach of trust are primarily liable. All parties to a breach of trust are equally liable, and if the Court should be of opinion that the widow has been guilty of a breach of trust,—though there is nothing, so far as the case has proceeded, to induce the Court to come to that conclusion—the decree would be as much against her as against the representatives of Mr. Marryat ; but the plaintiffs have a right to proceed against such of them as they think fit. The Court must

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therefore proceed to the consideration of the questions raised by this bill.

The argument was accordingly continued.

*Mr. Bickersteth, Mr. Tinney, Mr. Burge, Mr. Wray, and Mr. Jacob*, for the several defendants :

\* \* In *Hill v. Simpson* (1), and the other cases which had been cited, the assets were applied in satisfaction of antecedent debts of the executor, so that the possibility of their having been applied for the benefit of the testator was necessarily excluded.

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\* \* In *Keane v. Robarts* (2), the executors took nothing under the will. \* \* If, as had been intimated by the Court, no breach of trust had been committed by the executrix, who authorised the sale of the stock by executing the power, and who adopted the transaction by claiming the amount of the produce of the sale against the estate of the bankrupt, neither could any breach of trust have been committed by Mr. Marryat, who bore the same relation to the executrix, which an agent bears to his principal. Lastly, it was contended that the claim was barred by the Statute of Limitations, on which the defendants had insisted in their answers.

*Mr. Lovat* for Jane Tucker Crawford.

*Mr. Pemberton*, in reply, said it was clear that Mr. Marryat \* \* had no equitable right to sell the stock, knowing that the produce of the sale was to be applied in satisfaction of a demand which was not a demand upon the assets of the testator. It was sufficient to fix him with the knowledge that the assets of the testator were to be applied to a purpose inconsistent with the trusts of the will, even if he had himself reaped no benefit from the sale; and that knowledge was clearly proved by the correspondence between him and Mr. James Crawford. As to the interest of the sons under the will of the testator, the knowledge of which was supposed to have been sufficient to remove from the mind of Mr. Marryat all suspicion as to the proper applica-

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(1) 6 R. R. 105 (7 Ves. 152).

(2) 20 R. R. 306 (4 Madd. 332).

tion of the produce of the stock, it was to be borne in mind that the sons were not entitled to any portion of the property until after the death of the tenant for life. \* \* \*

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1893.  
Feb. 12.

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The Statute of Limitations has no application to this case. If Messrs. Marryat are chargeable, it is because, in the consideration of a court of equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will ; and it is further to be observed that, if this were a legal demand, the Statute of Limitations could not avail the defendants, because the title of the plaintiffs will not accrue in possession until the death of the widow, and their claim is, not for payment, but for security of the fund. All parties to a breach of trust are equally liable ; there is between them no primary liability ; and if the widow were a party to the breach of trust, that circumstance will not in any manner protect the defendants from the plaintiffs' demand. The plaintiffs make no charge against the widow ; and, as far as appears in this cause, there seems no ground for any charge against her. The sale of the stock might well be required for the payment of the testator's debts ; it was a reasonable, not an improvident act, therefore, on the part of the widow, to authorise a sale ; and it was clearly her duty to prove the amount of the stock under the sequestration, even if she considered that Messrs. Marryat were liable.

The correspondence between the testator and Messrs. Marryat, referred to as establishing their ignorance of the dissolution of the partnership between the testator and his sons, does not appear to me to warrant that inference ; but the fact is not material. Messrs. Marryat well knew that the stock in question belonged to the estate of the testator ; and they were parties to the application \*of the produce of the stock to relieve the embarrassments of the sons, in payment of a debt due from the sons to themselves, without even a representation from the sons that they had acquired a personal title to the stock, and without the least reason to believe that it was required directly or indirectly for the purposes of the testator's will.

[ \*147 ]

The circumstance of Messrs. Marryat having had the testator's

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will remitted to them, and of their having been the agents in obtaining the probate of the will, makes this case stronger than any similar case which has been reported; but without regard to that circumstance, it would be my duty to declare that for the amount of the stock sold, and the cash balance transferred from the credit of the testator's estate to the credit of John Crawford & Co., the defendant Joseph Marryat, and the estate of his father, are responsible; and the accounts must be taken accordingly.

The sum resulting from the account so taken will be assets of the testator, to be applied in a due course of administration; and for that purpose an account of the testator's debts and personal estate must be taken, and an inquiry must be directed as to the produce of the real estate sold by the defendant Bennett, the trustee under the sequestration, and of the application of that produce.

Messrs. Marryatt will be entitled to credit for the dividend paid to the widow on the proof made by her under the sequestration; and they will take such measures as they may be advised with respect to the widow, and as to the interests of the sons composing the firm of John Crawford & Co., under the testator's will; and they must pay to the plaintiffs, and to the widow, the costs of this suit.

1834.  
March 11, 12,  
14, 15, 22.  
[ 337 ]

The defendants, Joseph Marryat the younger, and the representatives of Joseph Marryat the elder, appealed from the [above decree, as reported in 1 Myl. & Keen, 337].

The *Solicitor-General* (*Sir C. Pepys*), *Mr. Knight*, and *Mr. Stuart*, in support of the decree.

*Sir Edward Sugden*, *Sir William Horne*, *Mr. Tinney*, *Mr. Burge*, *Mr. Wray*, and *Mr. Jacob*, for the appellants.

March 22.  
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The LORD CHANCELLOR, after stating the facts of the case, and commenting upon all the material parts of the correspondence, [and disposing of the question of lapse of time,] proceeded to the following effect:

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\* \* The main part of the case remains to be considered; and the case is one of considerable importance, though of no

material doubt or difficulty, whether we regard the fact or the law; and, concerning the law, whether we weigh the authorities, or look to the general principles which courts of equity apply to cases of this description, and upon which courts of law act as far as their forms of proceeding will permit; for to the same \*common principles of sound morality and of natural justice must the decisions both of courts of law and equity be referred.

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The facts of the case are clear; nor is there any dispute whatever upon those parts of the case which are essential to the determination of its merits.

Whether John Crawford ceased to be a partner or not during his lifetime, or whether Joseph Marryat and Son were cognizant of any dissolution of partnership, I do not stop to inquire. He may, for any thing that concerns the substance of the present case, have died a partner. But this is certain; the stock was his private property; Joseph Marryat and Son had known it to be so all along; they had received the dividends for his private account, and they continued to treat it as part of the separate estate after his decease. They saw his will, of which they obtained probate; and we cannot for a moment suffer it to be said that they were ignorant of its contents. Upon the face of this instrument, they saw that a sum of 27,000*l.*, besides their eventual share of the residue, was bequeathed to the younger children, who were not executors, and who had no concern whatever in the house of business. Indeed, the correspondence shews that Mr. Marryat must have known that some of them were infants, and three of them daughters.

It is also immaterial to inquire what, at the death of the testator, was the state of the account between John Crawford & Co. and Joseph Marryat and Son; for, to make the latter answerable, it is not necessary that the transaction should have assumed the form of a misappropriation with a view to pay a debt antecedently due to them. This is certain, that five months after the testator's death, and two after they had proved his will, Messrs. \*Marryat received a letter from the executors, which ought to have put them on their guard, for it sent a power of attorney to sell the stock as well as receive the dividends, and it desired the latter to be carried to the

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account of the trading firm, in which all the executors, save one, were partners. A short time afterwards, large drafts were made by the house of John Crawford & Co. upon Messrs. Marryat, and honoured by the latter; and about seven months after the will had been proved, and when Messrs. Marryat were in advance above 3,000*l.*, and were about increasing that advance to 7,000*l.*, they are desired, by three of the executors, in their capacity of co-partners trading with and indebted to Messrs. Marryat, to sell 10,000*l.* of the testator's stock, and hold the proceeds at the disposal, not of the executors, but of the trading firm of John Crawford & Co. Were Messrs. Marryat aware of the nature of this transaction? Did they perceive its meaning? Past all doubt they did, because the thing spoke for itself; but they shewed how accurately they understood it to be an irregular proceeding, by desiring to have the authority of the executors, under whose administration they well knew the fund was. The four executors having, by a previous arrangement, empowered one to act for all, and that one, with two of the others, forming the house of trade, the authority required is easily given. Under this authority, repeated as often as the necessities of the partnership required, the stock is sold piece by piece until the whole 33,000*l.*, and upwards, is converted into money; and the whole is applied to pay the advances from time to time made by Joseph Marryat and Son to John Crawford & Co., who, indeed, afterwards obtained still further credit to about two thirds of the same amount.

[ \*353 ] Two things here are abundantly evident, and they are sufficient to decide the whole question. First, that \*the executors were taking a fund which did not belong to them as traders, but was entrusted to them as representing its owner, and were using it for the purposes of their trade; and next, that Joseph Marryat and Son were fully aware of that fact, and lent themselves, as far as it was possible for them, to the proceedings of the executors, by which they themselves more or less profited. They received commission, of course, and had the other advantages of an agency, in the course of which large sums were received and paid. It is said that they only received the money from the sale of the stock, and paid it over. There can be no

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doubt, however, that these operations began when they were creditors to the Scotch house to a considerable amount, and that the first sale of stock reimbursed them that advance. It is manifest, then, that a breach of trust was committed by the executors; for what can be a greater, than that they should employ the estate committed to their care in the speculations of their own commerce? Nor can there be any doubt that Joseph Marryat and Son were accessaries to this breach of trust; for how could they more directly abet it, than by making themselves instrumental in its accomplishment, and partakers of its advantages? The moral impropriety, indeed, if any, is extremely slight, because they were all along supplying large sums of money; were wholly without suspicion of the Scotch house being in difficulties, till the moment of its failure; and were aware of the whole estate of Mr. Crawford being distributable among his widow and children; the male adults of these children, and principal legatees amongst them, being the partners in the firm. But these circumstances make no difference at all in the legal contemplation of the proceedings; nor can I believe that if it had ever struck Messrs. Marryat and Son in the light in which, wise by the event, they must afterwards have viewed it, they would have hesitated in withholding \*their consent to, and co-operation in, a course of dealing which really consisted in repeated misappropriations of a fund belonging to women and infants by embarking it in all the risks of trade.

[ \*354 ]

The fact, however, is attempted to be put in various ways, in order to escape the conclusion to which we are driven. First, the transaction is described as a winding up of the concern after John Crawford's death. But this supposed winding up was spread over two years and a half, reckoning from John Crawford's death, and is inconsistent with the fact, proved by the correspondence, that Messrs. Marryat knew the purposes to which the advances made by them were to be applied.

Next, it is said that Joseph Marryat and Son did not pay their own debt, but advanced money under the directions to sell, and then, under the same directions, recompensed themselves. But the sale began when they were 3,000*l.* and more in advance; and, independent of that, the course of dealing

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was advancing money to one person, and paying with the funds of another.

Again, it is represented as a kind of agency. But changing the name will not change the thing; it is the agency, whereby a person is directed by A. to take B.'s money which has been confided to A., and with it to pay A.'s debt, himself, the agent, profiting by the transaction; and we are here supposing that the debt of A. is not due to the agent, but to a third party. Then it is said, that if the stock had been sold and remitted to Scotland, and then sent back to Messrs. Marryat, nothing could have been said against the transaction. Upon this, however, we may observe, first, that if the matter had been so arranged as to make the contrivance capable of being \*traced, and it had appeared that the whole was a shift to conceal a transaction similar to the present, the case would have been the same with this; for no such devices, when detected, can ever stop the justice of the Court. But, secondly, it by no means follows, that because the parties might have accomplished their purpose in such a way as to be secure from the visitations of the law, therefore their misappropriation shall escape when nakedly perpetrated. Thus, no one can doubt that the executors, by interposing a third person, and giving the power of attorney to him, or by selling the stock themselves, might have safely paid Messrs. Marryat any antecedent advances. But this is only saying, that if the defendants had not been accessory to a breach of trust, they would not have had to pay the penalty of their accession.

If we look to the authority of adjudged cases, we shall find that those which have been decided in favour of the party receiving from the executor, had not certain material circumstances existing in the present case; and that those which have been decided against the party receiving, are far less strong against him than this.

[His Lordship then referred to the cases already mentioned and to some earlier equity cases, and to *Farr v. Newman*, 2 R. R. 479 (4 T. R. 621), and other common-law cases not having any direct application to the case before him, and concluded his judgment by saying:] It is said, that if executors shall not have

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the absolute power of validly transferring the property of their testators, no man can safely deal with them, because he will become liable for the malversation. I am of opinion, that neither will trade suffer nor will traders have a right to complain, nor will executors be unduly embarrassed in their administration of estates, if it be distinctly understood that any one proved to have abetted them in a misapplication of the funds committed to their care, and thus to have obtained possession of those funds, though for a valuable consideration, shall be accountable to the creditors of the estate and to the legatees, whether general or specific under the will; whether the transfer has been made to pay an antecedent debt of the executor, or to secure new advances of money intended by them to be misapplied, provided the misappropriation or intended misappropriation be known to the party.

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### TOWNLEY v. BOLTON.

(1 Myl. & Keen, 148—149; S. C. 2 L. J. (N. S.) Ch. 25.)

A testatrix gave 50*l.* Long Annuities to her sister M. T., and her said sister's husband, for their joint lives, and after their decease to her nephew. The husband, having survived the sister, was held to be entitled to the Long Annuities.

1832.  
Nov. 10.

*Rolls Court.*  
LEACH, M.R.  
[ 148 ]

THE will of Mary Benfield, dated the 12th of August, 1811, contained the following bequest: "I give to my sister Martha Townley, and her husband George Stepney Townley, 50*l.* per annum Long Annuities for their joint lives, and after their decease to go to my own nephew Charles Phipps." And the testatrix gave all the residue of her estate to her sister Arabella Sprigg, whom she appointed the executrix of her will.

The testatrix died shortly after the date of her will, leaving Martha Townley and Charles Phipps surviving her, and the will was duly proved by Arabella Sprigg. Charles Phipps died in 1818, and Martha Townley died in 1824. The bill was filed by the committee of George Stepney Townley, who was a lunatic, against the respective personal representatives of Charles Phipps and of the residuary legatee; the suit being instituted in pursuance of a report made by the Master, upon an inquiry directed

TOWNLEY     by the LORD CHANCELLOR, that it would be for the benefit of the  
                  v.  
BOLTON.     lunatic to ascertain his rights under the will.

*Mr. Bickersteth and Mr. Whitmarsh*, for the plaintiff :

[\*149]     The question is, whether, under the words of this bequest “during their joint lives,” the husband of Martha Townley became entitled to a life interest in the legacy, upon her decease, by survivorship, or whether the gift over is to take effect on the death of one of them. The plain import of the words is, that Martha Townley and her husband shall take as joint tenants; \*and if a different construction were to prevail, no benefit whatever would be given to the husband in his own right, and the addition of his name would be nugatory. The words “after their decease” put the meaning of the testatrix beyond doubt; for unless these words can be taken to be equivalent to “after the decease of one of them,” it is impossible that the testatrix could have intended to exclude the husband from the benefit of survivorship.

*Mr. Roupell*, for the representatives of Charles Phipps.

*Mr. Jacob*, for the executors of the residuary legatee.

THE MASTER OF THE ROLLS :

The gift over being after the decease of both husband and wife, it is plain that the testatrix intended that the survivor of the husband and wife should be entitled to the Long Annuities.

## BLAKEMORE v. THE GLAMORGANSHIRE CANAL NAVIGATION (1).

(1 Myl. &amp; Keen, 154—188; S. C. 2 L. J. (N. S.) Ch. 95.)

On an interlocutory application for an injunction, the Court will only act prospectively, and with a view to keep matters in *statu quo*, and will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined.

Effect of *laches* in depriving a party of his remedy by injunction.

Principles applicable to the construction of Acts of Parliament establishing public companies with extraordinary powers for the execution of works of local or general utility.

By 30 Geo. III. c. 82 [the “Company of Proprietors of the Glamorganshire Canal Navigation” were incorporated and empowered to make] a canal from Merthyr Tidvill, through the several parishes therein mentioned, to and through a place called The Bank, near to the town of Cardiff.

By the fifth section it was enacted, that such part of the said canal as should be made through the lands of Messrs. Harford, Partridge & Co. at Melin Griffith, should be made as near to the hill adjoining to such lands as conveniently might be, and should not be of any greater width than twelve feet in the respective places thereafter mentioned; and that such part of the said canal as should be made through the lands of the said Harford & Co. should be sufficiently walled from the bridge to the house therein mentioned, and should be fenced from the lands of the said Harford & Co. on the west side of the said canal by a substantial wall or paling five feet high at the least; and the same, and also the towing path to be made on the side thereof, should be kept in all parts separate from the cut or water-course by means whereof the said Melin Griffith works were supplied with water, and from the towing path belonging \*to such cut or water-course, unless the proprietors of the said works for the time being should, by writing under their hands, upon the application of the said Company of Proprietors, consent that the same should be united.

By the sixth section it was enacted, that a proper weir should be made upon the side of the said canal, above the said Melin

(1) *Norton v. L. & N. W. Ry.* (1878) 9 Ch. D. 623, 631; 47 L. J. Ch. 859, 39 L. T. 25; affirmed (1879) 13 Ch. Div. 268, 41 L. T. 429.

1824.  
Dec. 17, 23,  
24, 29.

Lord  
ELDON, L.C.

1825.

Dec.

1832.

Nov. 13, 14,  
15, 16, 19.

Dec. 20.

Lord  
BROUGHAM,  
L.C.

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[ \*155 ]

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Griffith works, within the lands of the said Harford & Co., for the purpose of letting off or conveying the surplus water, or such as should not be necessary for the use of the said canal, into the cut or water-course belonging to the said Melin Griffith works; and for better securing such surplus for the use of the said Melin Griffith works, the lock which should be made upon the said canal, below and nearest to the said works, should always be kept in good and sufficient repair and condition by the said Company of Proprietors, for the purpose of preventing leakage or waste of water.

[The seventh section contained a similar provision for the protection of certain iron works called the Penttyrch works.]

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By the forty-sixth section it was enacted, that the clear profits to be received by the said Company of Proprietors from the said navigation, should never exceed the sum of 8*l.* per cent. upon all such money as should be actually laid out and expended in making and completing the said navigation and the several works relating thereto, and in defraying the charges and expenses of obtaining the said Act; and that when the profits of the said canal should exceed 8*l.* per cent., the tonnages should be reduced so as to make the profits as near that rate as possible.

[The fifty-eighth, fifty-ninth, and sixtieth sections empowered adjoining landowners to make cuts communicating with the canal, and to construct works in connection therewith.]

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By an amending Act (36 Geo. III. c. 69), the Company were empowered] to raise an additional sum of 10,000*l.*, and also, subject to certain conditions, another like sum of 10,000*l.*, for the purposes therein mentioned. By the third section of this Act it was enacted, that the several works therein mentioned, and the extension thereby authorised to be made, and all other works whatsoever incident to the canal and extension, to be made and done by virtue of the [former] Act and that Act should, in all things, be finished and completed within the space of two years then next after the passing of that Act; and no part of the sum thereby authorised to be raised should be applied in or towards defraying the expenses of doing or performing any of the works therein mentioned, which should not be done and made within the said space of two years.

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Some years after the passing of these Acts, Richard Blakemore became the purchaser of the Melin Griffith and Pentyrch works, in the first Act mentioned; and the [Company] having made some alterations therein which Mr. Blakemore conceived would be prejudicial to his works, he, in the month of August, 1824, filed his original bill against the Company. This bill, after setting forth the two Acts already mentioned, stated that the canal was completed in the year 1801, prior to which time the aforesaid works of the plaintiff were (with the exception of what was derived from a small rivulet) wholly supplied with water from the river Taff; \* \* it further stated, that the defendants had begun \*to widen and deepen the canal, whereby the traffic on the canal would be increased, and a greater quantity of water be required, and that, as such additional supply was to be taken from the river Taff, the supply to the plaintiff's works would be necessarily diminished. The bill, therefore, prayed that the Canal Company might be restrained from doing any act for the widening, deepening, or enlarging the canal, or whereby any larger consumption of the waters of the river Taff might be caused than was contemplated by the Act, or whereby the supply of water to the plaintiff's works might be in anywise diminished; and also that the defendants might be restrained from laying out or expending, in such widening or deepening of the said canal, the surplus income arising from the rates thereof, beyond what might divide 8 per cent. on the capital authorised to be raised for the making of the said canal and the extension thereof.

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A few days afterwards, Mr. Blakemore filed his supplemental bill against the Company, \* \* stating that certain works and operations were then in progress or contemplation under the authority of the Company and the other defendants, and, in particular, certain operations for enlarging and deepening the basin of the canal at Cardiff; whereby, as the plaintiff alleged, an additional supply of water would be necessarily required for the use of the canal, to the plaintiff's prejudice; and praying that the defendants might be decreed to fill in the basin therein mentioned, and to restore it to the same state as it was in prior to the enlargement thereof; and that, in the meantime, the

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defendants might be restrained from filling the said basin with water, and using the same in its then present enlarged state and form, or permitting the same to be filled and \*used, or, if filled, from using or permitting the same to be used.

Upon the coming in of the answer, a motion was made before Lord Eldon to dissolve an injunction which had been obtained *ex parte* on the filing of the original bill. Lord ELDON, in delivering judgment upon that occasion, after stating very fully the material clauses of the Acts of Parliament, and the substance of the pleadings, commented at some length upon the mode in which the defendants had, by their answer, attempted to meet the allegations of the bill, with respect to the construction put upon the Acts of Parliament by the Court of King's Bench, and then continued to the following effect :

It does not appear to me to be of importance to consider whether these iron works have, or not, any right to the water, founded upon usage prior to the making of this canal ; because I follow and adopt the expression of the LORD CHIEF JUSTICE of the King's Bench, and I am glad to fasten myself in some measure on his great authority, and say that, when I look upon these Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them ; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous ; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do ; and that \*they shall do nothing else :—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals.

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It is upon this ground that applications are frequently made to stay operations, where a canal is in the progress of formation.

In such a case, it may be of very little consequence to A. B. whether the canal is brought to his lands through the lands of C. D., or through those of E. F.; nevertheless, if the Legislature has said the canal shall be brought to the lands of A. B. from the lands of E. F., and not of C. D., this Court would never permit the parties to bring the canal to the lands of A. B. from the lands of C. D.: the parties are obliged to submit to the contract which the Legislature has made for them. The result is, that the contract shall be carried into execution; and the King's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to any thing except what the Legislature has said shall be done. I have therefore stated, and I have already more than once acted upon the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and for this reason, that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another; and, particularly, he might feel that objection in a case where parties, after obtaining from the Legislature leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A. B. that the canal should come through the lands of C. D. than through those of E. F.; but to that my answer is, that you have bargained with the Legislature \*that you shall do the act they have authorised you to do, and no other act.

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There is another consideration to which, I apprehend, this Court would feel very much inclined to attend. Individuals come to the Legislature, and apply for a Canal, or a Railway Act; and the Legislature says, You shall have a canal, or railway, to run from such a point to such another point; thereby exposing many persons to infinite inconvenience, and in a great measure destroying the comfort of those who have property upon the line through which the canal, or railway, is to pass. I agree that parties must submit to that, if such be the will of the Legislature: but, I say, that if individuals go to Parliament, and Parliament, on being satisfied that the railway or canal can be made at an expense of, say 100,000*l.*, closes with their

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application, and forms them into a Company, with power to raise money to that amount; that authority is given them by Parliament, in the full confidence that the sum which they have asked and obtained power to raise, will enable them to execute the work. But, if a case arises in which parties have been enabled by Parliament to engage in an undertaking, on a representation that 100,000*l.* would enable them to complete it, and if they find afterwards that 100,000*l.* is not enough for that purpose, this Court would, I think, find it very difficult to allow them to proceed with the work till they had obtained further authority, and till they had satisfied Parliament that, though they had deceived the Legislature in the first instance, they were entitled to obtain an extension of their powers. There is an agreement on the part of those who satisfy Parliament, that they can and will do such a work for such a sum of money; and, upon the faith of that understanding, they get the authority to begin the work: but if they deceive Parliament, what \*right have they to complain if courts of justice will not allow them to go on with the deception?

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It is, therefore, of great importance to see what is the real meaning of this Act of Parliament; and the question as to its real meaning may be put in this way: When was the canal, which this Act authorised to be made, completed? If, after the canal was completed, the Proprietors are to be at liberty to widen and deepen and alter the canal just as they please, what was the use of the Act of Parliament which gave them power, within certain limits, to make the canal? The Proprietors are by this Act empowered to buy the land, we will suppose, of A. B.; they are also empowered to buy land of C. D. and E. F. Well, if those parties, A. B., C. D., and E. F., give their consent to the bill, or withhold their opposition while it is passing through Parliament, and if the bill be passed into a law, that thing is to be done, and nothing but that which is specified in the Act is to be done. But if that thing is done, and the canal is completed, in the sense which the Act of Parliament means by the word "completed," and in the sense put upon the word by these defendants themselves (as is shewn by their going about to levy their tolls on the whole course of the canal), and

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if, notwithstanding, they may afterwards widen and deepen the canal, what is there to hinder them from carrying it from sea to sea? Why, there would be no end to it. When the canal is completed, the powers of the Company are exhausted; and, in making the canal, the Proprietors are bound to attend to the interests of all whose interests the Act of Parliament requires them to attend to; and they are not at liberty afterwards to injure the interests of parties by making what is quite a different canal. Not a word is to be found in these Acts of Parliament giving the least authority to alter the canal after its completion, unless \*such authority might be considered to be given under the word “improving”; an expression which occurs but twice in the whole course of the first Act, and not at all in the second. Taking, however, the whole of the enactments together, I think the effect of that word is not to enable the Proprietors to widen and deepen the canal, but to enable them to improve the works of the canal (the improving of which works improves the canal), and not to make it a different canal.

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[His Lordship, after remarking at some length upon the course taken by the legal advisers of the Canal Company, proceeded:]

In the first Act, it was considered expedient to secure the interests of the partnership of Harford, Partridge & Co., as the owners of the Melin Griffith and Pentyrch Works; and provision is accordingly made, with that view, in the fifth and sixth sections; whereby it is enacted, “That a proper weir shall be made upon the side of the said canal, above the said Melin Griffith Works, within the lands of the said Harford, Partridge & Co., for the purpose of letting off or conveying the surplus-water, or such as shall not be necessary for the use of the said canal, into the cut or watercourse belonging to the said Melin Griffith Works.” Then there is a provision made for keeping all this in repair. The meaning to be put upon this provision has been differently stated. But on what ground could the Legislature ever have intended to leave it within the power of the Proprietors to widen or deepen the canal in such a manner as to require a much larger supply of water? Would

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that be a rational construction to put upon an Act of Parliament, which provides that a proper weir shall be made upon the side of the canal, for letting off or conveying the surplus water. Under such a construction the persons \*who had made the canal, on the side of which the weir was to be placed, would be at liberty, the very next day, if they could agree with the land-owners, or had lands of their own through which to cut, to widen, and deepen the canal, so as to render the weir absolutely useless, and to destroy the surplus water altogether, and for as long a period as they chose. It appears to me to be quite impossible to say that this is the meaning of the Act of Parliament. The true construction I take to be this, that the Company of Proprietors shall make their canal; that, when they have made it, that is, when they have advertised to the world that it has been made, and have taken tolls from the public as if it were made, they shall not be at liberty to alter it; that, having made their canal, they shall erect this weir upon it, in order to secure to the mills that surplus water which, consistently with such a canal, and the provision for the weir, will, on such an arrangement, remain for the use of these mills. I am, therefore, myself of opinion (and if that opinion is supposed to be wrong, I am perfectly willing that a case should be made upon it for the opinion of the Court of King's Bench), that this was a contract between the parties, and that the larger construction therefore which may belong to some of the expositions or statements of the right claimed by the Canal Company, in their answer, is a construction which the Act of Parliament will not warrant.

On a subsequent day, Lord ELDON, in finally disposing of the case, made the following observations :

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If my opinion upon the effect of the Acts of Parliament be right, then, although the owners of these works must take the surplus water, subject to the diminution which an increase of the trade upon the present canal shall occasion, let it increase ever so much or ever so little, I \*can never agree to the proposition as laid down in some parts of the answer, that the Proprietors of the navigation are at liberty to improve the canal for the purpose of bringing upon it an increase of trade, and, by such

improvements with a view to a contemplated increase of traffic, to affect the surplus water which was, I apprehend, to be preserved for the benefit of the plaintiff's works.

Supposing the Court to be right in its opinion, that the Canal Company could not do what they were attempting to do, another consideration might then arise; for many cases have occurred in which injunctions are applied for, and are granted or refused, not upon the ground of the right possessed by the parties, but upon the ground of their conduct and dealings before they applied to the Court for the injunction to preserve and protect that right. Before proceeding to that point, however, I must observe, that the answer of the defendants does most distinctly admit that, if there should be an increase of trade, there would then be a decrease of water; but then they add, they do not think that such decrease would be a greater injury to the plaintiff than what would arise from an increase of trade upon the canal in its existing state, as now completed. I consider that distinction to be of no importance. If the decrease of water be occasioned by an increase of trade upon the canal as it is now completed, hurtful as that would be to the Melin Griffith and Penttyrch Works, it would not be injurious to them,—injurious in the sense which a court of justice puts upon the word; for if, by the necessary operation of the Act of Parliament, and of the arrangements which the Legislature has made for the benefit of the owners of the canal on the one hand, and of the owner of these works on the other, an increase of traffic should be occasioned, each of them must \*take the effect of those arrangements; but if the same, and only the same, consequences were to be produced by an alteration and improvement in the canal (using that term in the sense in which the answer has used it), still, I say, if the alteration be not sanctioned by Parliament, you are not to bring about the same consequences by means other than those which the Act of Parliament has provided. The result amounts to no more than this,—that, if you are doing an act which is to increase the trade, and which is conformable to the provisions of the Act of Parliament, the consequences, be they what they may, are produced by the Act of Parliament, and not by you; but, if I am right in point of law, you would not be at liberty to change

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the operations, for the purpose of producing the same effect, without the authority of another Act of Parliament.

His Lordship concluded by directing that the injunction should be varied, and that the defendants should be restrained from further widening or enlarging the said basin, and that the parties should proceed to a trial at law upon two issues, which, as finally settled, were the following: "First, whether the widening and deepening of the basin in the pleadings mentioned, as the same was widened and deepened before the 28th day of August, 1824, did, or will, to the damage and injury of the plaintiff, diminish the surplus water to the said Pentyrch and Melin Griffith Works, or either of such works, as such supply was provided at the time the canal was completed in 1801?" "Secondly, whether the further widening or deepening the said basin, as the same was intended to be deepened or widened before the injunction in this cause was granted, would, or might, to the damage and injury of the plaintiff, diminish the supply of surplus water to the said works, or either of \*them, as such supply was provided at the time the canal was completed in 1801?"

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The issues came on for trial in February, 1826, before Lord Wynford, then Chief Justice of the Court of Common Pleas, when, after a trial which lasted three days, the jury found a verdict for the defendants, on the first issue, and for the plaintiff on the second.

On the 10th of June, 1825, the plaintiff filed his second, and on the 18th of May, 1828, his third, supplemental bill against the Canal Company, and against certain proprietors of adjacent lands, for the purpose of restraining the defendants from commencing or continuing certain other works therein described as being then in contemplation or progress, and of which, as the bill alleged, the direct tendency or effect was, to widen, deepen, or otherwise enlarge the navigation, and to increase the quantity of water required for the consumption of the canal.

On the 25th of June, 1828, Lord Chancellor LYNTHURST directed the trial of certain issues, framed upon the same principle with the issues formerly directed by Lord ELTON; but those issues were never afterwards proceeded with. Lord LYNTHURST, in

giving judgment upon that occasion, stated that he concurred with Lord ELDON and Lord WYNFORD in considering the Acts of Parliament in the light of a bargain between the Company of Proprietors and the plaintiff, and in holding, that after the canal was finally completed, the Company were no longer at liberty to alter or enlarge it to the damage of Mr. Blakemore. His Lordship also observed, that in his view, the opinion expressed by the Court of King's Bench was not really inconsistent with this \*construction; and that the *dicta* of the Judges, and especially of Mr. Justice BAYLEY with reference to further improvements, by widening and deepening the canal, were plainly to be understood in a qualified sense, and in connection with the point then directly before the Court; and that was a mere question between the Company and the freighters, in the consideration of which the rights of Mr. Blakemore as an individual were expressly excluded.

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On the 26th of July following, the plaintiff obtained an injunction, restraining the defendants from widening or deepening that part of the canal called the Three-mile Pond. Various other proceedings were at different times had in these causes; and, in the year 1827, the plaintiff commenced an action against the Canal Company for the recovery of damages in respect of the injury sustained by him, by reason of their widening and deepening the canal, and of their having erected the fire-engine in the declaration mentioned. The action was tried at Hereford; and a verdict was found for the plaintiff, on certain of the counts, upon which judgment was entered up in the Court of Exchequer(1). The judgment afterwards came, by writ of error, before the Court of Exchequer Chamber, and, ultimately, before the House of Lords, and on both occasions was affirmed (2).

\* \* \* \* \*

On the 4th of June, 1832, the plaintiffs Richard Blakemore, and his partner Mr. Booker, filed a fourth supplemental bill against the Canal Company, and against Thomas Powell, who was an extensive shipper of coals at Cardiff. This bill set forth all the previous proceedings already stated, and in particular the proceedings upon the trial of the issues and the action, submitting

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(1) *Blakemore v. Glamorganshire Canal Company*, 3 Y. & Jer. 60.

(2) The case upon the appeal is reported in 1 Cl. & Fin. 262.

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that, by the judgment of the House of Lords upon the writ of error, it had now been finally settled and determined, that after the expiration of the year 1798 the Company of Proprietors had no right to commence or carry on any new works adversely to the interests of any individual, or to widen, deepen, or enlarge the canal, so as to interfere with the water which had been apportioned to the plaintiff's works; and farther, that it was an illegal violation of the plaintiff Blakemore's rights as owner of those works, for the Company, or any person by their authority, to draw off or divert from the river Taff any quantity of the water, which otherwise would have flowed to such works. The bill further stated that the defendant Powell had, in the year 1829, with the knowledge and connivance of the Company, constructed a certain collateral cut or pond communicating with the Sea Lock Basin, and which collateral pond it was alleged was merely a contrivance for enabling the Canal Company to enlarge their canal, and consequently to draw a larger quantity of water from the river Taff, to the injury of the plaintiffs. The bill, among other things, prayed that the injunction against the Company (which had already been granted as to the Sea Lock Basin and the Three-mile Pond) might be extended to the whole canal; and it prayed, as against Powell, that he might be ordered to fill up the collateral pond, and in the mean time be restrained from keeping open the communication between such collateral pond and the Sea Lock Basin.

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A motion was now made in the original and supplemental causes, that the defendants, the Canal Company, and their agents, might be restrained from using any fire-engine for the purpose of pumping the water of the Taff into the canal; and also from drawing off any part of such water which would otherwise flow to the plaintiff's works through the watercourse before mentioned; and also from permitting water to be supplied to the collateral pond from the Sea Lock Basin, and from continuing the communication between the collateral pond and the Sea Lock Basin, and also from continuing the Sea Lock Basin and the Three-mile Pond, and certain other specified parts of the canal, of any greater depth or width than the same respectively were of at the time when the canal was completed in 1798; and also

from allowing the bottom and sides of the canal to remain not sufficiently puddled and secured; and also from continuing to leave the works of the canal, and particularly the two parliamentary weirs, and the locks below those weirs, out of repair; and also from widening, deepening, or otherwise enlarging any part of the canal, and from permitting any alteration to be made therein, or in the locks or works thereof, so as to facilitate the traffic of a greater number of barges, or of barges of larger dimensions than could at the time when the canal was completed pass along the same; and that the defendant Powell might be restrained from keeping open or continuing the communication between the collateral pond and the Sea Lock Pond, or basin, and from supplying the same with water from the Sea Lock Pond.

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The affidavit of the defendant Powell (who denied all collusion with the Canal Company) stated, that he conceived himself to be fully warranted by the terms of the Act of Parliament in forming the collateral cut or \*pond in question, which was of great value and importance to him in his trade as a coal-shipper; that he had accordingly commenced excavating the ground in the year 1829, and that the cut was completed in the month of February, 1830; and that no objection was raised by Blakemore till the month of September, 1831, long after the work had been finished and brought into use.

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*Mr. Pepys* and *Mr. Wakefield*, for the motion.

The *Solicitor-General* (*Sir W. Horne*), *Sir E. Sugden*, *Mr. Swanston*, and *Mr. Maule*, for the Canal Company.

[In the course of the argument,]

Much discussion arose with respect to the jurisdiction of courts of equity to interfere by injunction in cases of apprehended or prospective mischief; and it was strongly urged, on behalf of the Canal Company, that, if the motion were granted in the form and to the extent now sought, the order would, under pretence of restraining the defendants from continuing to allow certain things to be done, in effect compel them to perform positive acts, tending to alter the existing state of matters; a species of relief which, if given at all, could only be decreed at

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the hearing. *Robinson v. Lord Byron* (1), and *Lane v. Newdigate* (2), which were supposed to be authorities for such an order, were in very peculiar circumstances; and the form under which the object was effected in those cases had been frequently \*disapproved. [*Coats v. The Clarence Railway Company* (3), *Weall v. West Middlesex Water Works* (4), and *Attorney-General v. Nichol* (5), were referred to.]

*Mr. Jacob*, for the defendant *Powell*, contended, first, that the works carried on by *Mr. Powell* were fully authorized by the fifty-eighth, fifty-ninth, and sixtieth clauses of the first of the Canal Acts, and were constructed in strict conformity with the provisions of those clauses; and, secondly, that, independently of that consideration, the plaintiffs, by lying by and allowing the works to be completed without remonstrance or objection, had precluded themselves in a court of equity from being now heard to complain.

1832.  
Dec. 21.

THE LORD CHANCELLOR [after commenting upon the cases cited, said:]

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The leading principle then on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay farther injury, to keep things as they are for the present.

[ \*186 ]

The next, and the only other point to which it is necessary to advert, is the construction put upon the \*two Acts of Parliament, the 30 and 36 Geo. III., with reference to the time allowed for completing the canal. I say the two Acts, for although the question has principally been raised upon the third section of the thirty-sixth, yet it seems difficult to construe that without having regard to the thirtieth, and particularly the first section of the thirtieth.

(1) 1 Br. C. C. 588.

(3) 32 R. R. 183 (1 Russ. & M. 181).

(2) 7 R. R. 381 (10 Ves. 192); and

(4) 21 R. R. 183 (1 J. & W. 358).

see *Rankin v. Huskisson*, 33 R. R. 86

(5) 10 R. R. 186 (16 Ves. 338).

(4 Sim. 13).

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CANAL.

It is now too late to discuss this ; for, whatever might have been the merits of the question had it been entire, judicial decisions have given an interpretation to the third section which ought not now to be shaken. Ever since the Court of King's Bench considered the Acts as forming a contract between the Company and the neighbouring proprietors, it has been judicially held (although it is said that a most able and learned Judge expressed a contrary opinion), that the canal should not be altered even within the limits allowed by the earlier Acts. Notwithstanding the great weight of decision in support of this construction, the more I consider the frame of the third section, and the point of construction generally, I am the more impressed with the opinion (which I therefore fling out for Mr. Blake'more's best consideration), that he is greatly interested in resting satisfied with the position in which these adjudications have left the question, and, above all, in not further pressing so wild a pretension as that which would stop all improvements of the canal, whereby eventually somewhat more water may seem to be used. To a certain length I think him entitled under the shelter of those decisions, but beyond it I am not prepared to aid him, certainly not in this stage of the cause. The injunctions granted in 1824, as to the Sea Lock Basin, and in 1828, as to the Three-mile Pond, are confined, the one to widening and deepening, the other to widening, deepening, and enlarging \*the water way ; in substance both prohibit the enlargement of the canal. The prohibition now granted will extend to the whole canal, with the addition of these words, "so as directly and by the immediate operation of such enlargement to lessen the supply of water to the Melin Griffith works, or the Pentyrch works, or either of them ;" and, subject to a like qualification, I will also restrain the Company from "erecting, or permitting to be erected or used, any engine other than is now erected and used by them ; from making any new cuts, or deepening any cuts already made, communicating with the river Taff, or using any pipes or other contrivances whatever for drawing water from the said river other than are at present used by them, and from altering the locks, weirs, or other works of the canal." I add these words to the qualification, "directly and by the immediate operation

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of such enlargements, erections, cuts, and deepening," in order to prevent the pretence being set up against every improvement of the canal, that it increases the traffic, which every improvement may do, as by lessening the expenses of the company, and enabling them to reduce their dues. Thus, if a new engine or lock upon an improved principle enabled them to accomplish this end, it would not come within the prohibition. It might, by increasing the traffic, indirectly and mediately increase the consumption of water; but this would not be its direct and immediate operation. If such engine or lock occasioned directly and immediately a greater consumption of water, it would come within this order.

[ \*188 ]

It will be perceived, that, pursuing the leading principle which I began with stating, adopting the constructions imposed by decisions upon the Acts, and adapting the principle to that construction, or rather acting upon that construction up to the limits of the \*principle, the whole motion is now disposed of, with the exception of the part relating to Mr. Powell; for the injunction, as I have given it, being alone granted, all the other parts of the motion are refused, (it is unnecessary to go through them in detail,) upon the grounds which I have stated, except the last clause relating to Mr. Powell, and with respect to him, it is needless to discuss the fifty-eighth, fifty-ninth, and sixtieth sections of the first Act, on which he relies, and on which I expressed very considerable doubt in the course of the argument; for the length of time which has elapsed since February, 1830, and perhaps, in some measure, the application of the general principle on which this judgment is grounded, preclude me from granting the injunction as prayed against him. As against him, therefore, the

*Motion is refused with costs.*

1833.  
Jan. 25.

*Rolls Court.*  
LEACH, M.R.  
[ 195 ]

## STACEY v. ELPH.

(1 Myl. & Keen, 195—199; S. C. 2 L. J. (N. S.) Ch. 50.)

A person, named as executor and trustee under a will, did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended

upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: Held, that he was not, under the circumstances, chargeable as executor or trustee.

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A deed of disclaimer is the best evidence of the renunciation of a trust, but the conduct of the party desirous of renouncing a trust, may amount to a disclaimer.

JOSEPH DENNY, by his will dated the 24th of September, 1796, after directing payment of all his debts, devised a certain copyhold messuage called the Herring Fishery, and a piece of freehold ground with a stable erected thereon, to his wife Susanna for her life, and after her decease he gave and devised the same to his executors thereafter named, upon trust that the same might be disposed of, and the monies arising from the sale thereof be equally divided among his children in the same manner as his personal estate; and as to the rest of his freehold and copyhold lands, buildings, household furniture, stock in trade, wherries and boats, he gave the same to his executors, in trust to dispose of so much thereof as might be sufficient to discharge all incumbrances upon his real or personal estate, and apply the overplus according to the best of their judgment and skill for the use, maintenance, and education of all his children, which should be living at his decease; and after the decease of his said wife, he directed all the said freehold and copyhold lands, &c. which should remain undisposed of, to be sold, and the produce of the sale thereof to be divided equally among his children. And he appointed his said wife Susanna, John Elph, and Henry Smallpiece Fox, executors of his will.

The testator, who kept a public house at the Herring Fishery, died in April, 1800, leaving his wife Susanna and five children surviving him. The widow proved the \*will alone, and continued to carry on the testator's business. In 1802, the defendant Elph purchased a wherry of the widow for the sum of 190*l.*; and in 1804, being applied to by the widow to assist her in the arrangement of her affairs, which had become embarrassed, he negotiated the sale of the stock in trade and of a portion of the testator's real estate. Upon this occasion an allotment made in respect of a right of common was purchased by Joseph Denny, the eldest son of the testator, for 20*l.*; and the stable and piece

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v.  
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of ground, devised to the widow for her life, was purchased by Elph himself, for 80*l*. The whole produce of the sale was applied in paying the debts of the testator, and debts contracted subsequently to the testator's death by the widow. Elph did not obtain a conveyance of the stable and piece of ground until the year 1808, when the widow and Joseph Denny the younger, conveyed the same to him by deed of feoffment, with livery of seisin, in consideration of the said sum of 80*l*. In 1811, Elph purchased from the widow and devisee of Joseph Denny the younger, the allotment which had been sold for 20*l*. to Joseph Denny the younger, for the sum of 88*l*. The testator's widow, Susanna, died in 1818; Elph then renounced probate, and administration was granted to the plaintiff Elizabeth Stacey, one of the testator's daughters. Henry Smallpiece Fox died in 1824, without having taken any part in the execution of the trusts of the will.

[ \*197 ]

The bill, which was filed against Elph and surviving children of the testator, and the representatives of deceased children, charged that the defendant Elph had interfered with the testator's property in the character of executor and trustee, and prayed accounts against him accordingly; and that the defendant might be declared a trustee for the plaintiff of such portion of the testator's real estate as he had himself purchased. Various transactions \*were impeached by the bill, the charges in respect of which were abandoned at the Bar by the plaintiff's counsel, and the facts above stated were proved, or admitted to be the only material facts in the cause. The defendant denied, by his answer, that he had ever acted or interfered in the executorship of the testator's will, or that he had accepted the trusts thereof; and he insisted that, in assisting the widow to dispose of the property with a view to the arrangement of her affairs, he had acted solely as her agent, and under her directions.

*Mr. Bickersteth*, and *Mr. Garratt*, for the plaintiff, contended, that a person appointed executor in a will, who had dealt, as it was admitted, with the assets of the testator, could not withdraw himself from responsibility by afterwards renouncing, and insisting that he had only acted in the capacity of agent. Neither could a

trustee, who had interfered with the subject of the trust, and had actually purchased a part of the trust estate as for his own benefit, be permitted to repudiate the character of trustee by alleging that he was a mere factor or agent: *Conyngham v. Conyngham* (1).

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ELPH.

*Mr. Pemberton*, and *Mr. Sharpe*, for the defendant Elph, insisted, that it was clear from the conduct of Elph, that he, as well as the other person who was named executor and trustee in the testator's will, refused to accept either the executorship or the trust. The fact of taking a conveyance from the widow and the eldest son of the small portion of real estate, which Elph had purchased, proved that he repudiated the trust; and it was not pretended at the Bar by the plaintiff's counsel, whatever might be the allegations in the bill, that the defendant had not given the full value for the part of \*the property which he had purchased, or that he had acted otherwise than with perfect good faith and regard to the interests of the testator's family, throughout the transactions in which he had been concerned. A man could not be clothed with an estate against his will; and if a person, named a trustee, disclaimed the trust by deed, it had been held, that the effect of such disclaimer was, that the estate never vested in him at all: *Townson v. Tickell* (2). It was true that no deed of disclaimer had been executed in this case; but where the executorship had been actually renounced, and the intention to disclaim the trust was as manifest as if a deed of disclaimer had been executed, this Court would not permit a party to take an unconscientious advantage of such an omission, by a bill seeking to open and rescind transactions, admitted to be substantially unimpeachable, and the most recent of which occurred upwards of twenty years ago.

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#### THE MASTER OF THE ROLLS :

The particular facts of the case of *Conyngham v. Conyngham* are not stated in the report, but they are spoken of by the LORD CHANCELLOR in his judgment as having been ambiguous. In this case there is no ambiguity in the conduct of the defendant Elph; he never interfered with the property, except as the

(1) 1 Ves. Sen. 522.

(2) 22 R. R. 291 (3 B. & Ald. 31).

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[ \*199 ]

friend or agent of the widow ; and it is plain from the confidence which the testator appears to have placed in him by his will, that he was a particular friend of the family. It never became necessary that he should formally renounce the executorship until the death of the widow, and then his formal renunciation took place. It is true he never executed a deed disclaiming the trust, but his conduct disclaimed the trust ; in the purchase of the small real \*estate made by him, he took by feoffment from the widow and eldest son of the testator, in whom the estates could only vest by the disclaimer of the trustees.

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer, and admits of no ambiguity ; but there may be conduct which amounts to a clear disclaimer, and such appears to be the case here. It seems plain here, that, in consequence of Elph and his companion refusing to accept the trust, all parties considered that the will failed as to the real estate, and that the real estate descended to the heir-at-law.

*The bill must be dismissed, as against the defendant Elph, with costs.*

1833.  
Jan. 26.

Rolls Court.  
LEACH, M.R.  
[ 200 ]

# DAVID v. FROWD (1).

(1 Myl. & Keen, 200—211 ; S. C. 2 L. J. (N. S.) Ch. 68.)

Where an intestate's estate has been distributed, under a decree in an administration suit, among persons found by the report to be his next of kin, a person claiming to be the sole next of kin of the intestate is not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin, for the purpose of obtaining restitution of the fund so distributed. And if the right of the plaintiff so claiming shall be established, the persons among whom the fund has been distributed will be compelled to repay it to the plaintiff, but the plaintiff will be bound by the accounts taken in the administration suit.

DAVID WILLIAMS of Llanblethan, in the county of Glamorgan, died intestate in the month of January, 1828, being possessed of property to the amount of 4,000*l.* and upwards. On the 21st

(1) *Provuse v. Spurgin* (1868) L. R. 5    *Hilliard v. Fulford* (1876) 4 Ch. D. Eq. 99, 37 L. J. Ch. 251, 17 L. T. 590;    389, 46 L. J. Ch. 43, 35 L. T. 750.

of February, 1828, the defendant Edward Frowd, who was a solicitor, and Jane his wife, who claimed to be one of the intestate's next of kin, took out administration to the intestate's estate. On the 22nd of the same month a bill was filed in the name of Ella Church, a sister of Mrs. Frowd, and other parties, also claiming to be next of kin of the intestate, against the defendant Frowd and his wife, praying the usual accounts of the intestate's estate, and an inquiry as to his next of kin. The defendants immediately put in answers to the bill, and a decree in the cause was made by consent on the 29th of the same month of February. By that decree the usual accounts of the intestate's estate were directed to be taken, and it was ordered that the Master should inquire who were the next of kin of the intestate, and the decree contained the usual directions in that behalf.

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On the 6th of May, 1829, the Master made his report, whereby he certified that he had caused the usual advertisements to be published, calling upon the next of kin of the intestate to come in and prove their claims before him by a peremptory day fixed for that purpose; that in pursuance of such advertisements Ella Church, Jane Frowd, and seven other persons named in his \*report, had made their claims before him, and he found that these nine persons were the only next of kin of the intestate living at the time of his death. The Master further found, that no creditors had come in; and he made his report as to the accounts of the intestate's estate.

[ \*201 ]

This report was confirmed by an order dated the 22nd of May, 1829; and by an order on further directions, dated the 29th of May, 1829, an apportionment of the intestate's property was directed to be made between the persons found by the Master to be the next of kin. The Master having, in pursuance of this order, made the apportionment, which amounted to 474*l.* 16*s.* for each share, an order for payment was obtained on the 10th of August, 1829.

The present bill was filed in December, 1830, by the plaintiff Mary David, a person ninety years of age, stated to be bed-ridden, and in the receipt of parish relief, who claimed to be the sole next of kin of the intestate, against Frowd and his wife, and the other persons among whom the intestate's estate had been distributed.

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v.  
FROWD.

[ \*202 ]

The bill, after stating the above-mentioned proceedings in the suit of *Church v. Frowd*, alleged that the plaintiff was the first cousin once removed, and sole next of kin of the intestate; that she had been long resident in the parish of Peterstone, in the county of Glamorgan, but that she was not aware of the death of the intestate until six months after that event took place; that being informed that no one could compel any distribution of the intestate's estate for twelve months after his decease, she took no steps to enforce her claims until February, 1830, when she laid a statement of her case \*before Messrs. Bassett, solicitors; and that Messrs. Bassett returned to her the papers and documents relating to her claims at the end of ten months, declining to take any steps in her behalf. The bill further stated that the plaintiff was an illiterate person, being unable to read; that she was ignorant, until very lately, of any proceedings having been instituted in this Court; that she had never heard of any advertisements from the Master's office, and that no inhabitant of the parish of Peterstone ever took in a newspaper. The bill charged, that the plaintiff was not bound by the proceedings in the suit under which the intestate's property had been distributed; and it prayed that the decree and decretal orders in that suit might be reversed; that the plaintiff might be declared to be entitled to the whole of the intestate's personal estate after payment of his debts and funeral expenses; and that the defendants might be decreed to pay to the plaintiff the several shares which had been allotted and paid to them respectively in respect of such estate.

The defendants, by their answers, put in issue the legitimacy of the plaintiff, and submitted that even if the plaintiff were the sole next of kin of the intestate, or one of his next of kin, the decree and decretal orders in the administration suit were a bar to her claims.

It was agreed at the Bar that the plaintiff's title, as next of kin, should be admitted for the purpose of arguing the question, whether she was precluded by the decree in the administration suit from claiming the relief sought by the bill.

*Mr. Pemberton and Mr. Lynch* for the plaintiff. \* \* \*

*Mr. Agar, Mr. K. Parker, and Mr. Neate, for several defendants :*

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FROWD.  
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This is a case of first impression, and it is impossible to apply to a suit of this kind, which has never before been instituted, the principles which are admitted to be established as between a creditor and a legatee. \* \* \*

*Mr. Bickersteth and Mr. Stinton, for two of the defendants who had established their claims as next of kin under the reference in the original suit, not having been parties to that suit :*

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\* \* The adjudication of a court of equity, after all the inquiries which that Court directs for its own satisfaction have been made, is the highest title which a party can have to the property which has been so awarded to him, and that title cannot be disturbed without great inconvenience and danger. \* \* This question ought not to be decided with reference to the inconvenience or hardship that may be sustained in a particular case, but upon those general grounds of public policy which render it most important that the limits to litigation should be accurately ascertained, and that parties who receive money under the adjudication of a court of justice should \*know that they have a right to deal with that money as their own.

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[ \*208 ]

\* \* \* \* \*

#### THE MASTER OF THE ROLLS :

It is a matter of surprise to me that this is treated as a case of the first impression. I consider that all the principles which must govern this case are well established, and rest upon clear precedents. The personal property of an intestate is first to be applied in payment of his debts, and then distributed amongst his next of kin. The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator.

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F. FROWD.

[ \*209 ]

Upon the application of any person claiming to be interested, the Court refers it to the Master to inquire who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the \*administrator may reasonably proceed to distribute the estate amongst those who have, before the Master, established an apparent title. Such proceedings having been taken, the Court will protect the administrator against any future claim. But it is obvious, that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the Court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it.

It is for this reason that if a party who has not gone in before the Master applies to the Court after the Master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of wilful default in not claiming before the Master, the Court will refer it to the Master to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the Master. This is every day's practice with respect to creditors. For the same reason, if a creditor does not happen to discover the proceedings in the Court until after the distribution has been actually made by the order of the Court amongst the parties having by the Master's report an apparent title, although the Court will protect the administrator who has acted under the orders of the Court; yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the Court will, upon proof of

no wilful default on the part of such creditor, and no want of \*reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him. For this principle I need only refer to the case of *Gillespie v. Alexander* (1) before Lord Eldon, which has been introduced in the argument. There the estate had been apportioned under the order of the Court amongst the legatees, and actually paid to them; except that, one legatee being an infant, his proportion could not be paid to him, but was carried to his account in the suit. After this distribution by the order of the Court, a creditor who had not claimed before the Master established his title, and Lord LYNDEHURST, then Master of the Rolls, acting upon the principle which I have stated, directed payment of the creditor's demand out of the fund in Court which had been carried to the account of the infant. Lord ELDON considered most justly, that the share carried to the account of the infant was as much the property of the infant, as if it had been actually paid to him, and that the infant's share was liable to the creditor's demand only in the proportion that the other legatees were liable in respect of the sums which they had received, and to that extent reversed Lord LYNDEHURST's order; thus establishing the principle, that legatees, who had received payment under the order of the Court, were bound to refund to a creditor who had never claimed before the Master.

DAVID  
v.  
FROWD.  
[ \*210 ]

It is argued that there is a distinction between a creditor, and a person claiming as next of kin, because a creditor, it is said, has a legal title; the right being equal, there is no distinction in a court of equity between a legal and equitable title. It is not, however, accurate to say that a creditor continues to have a legal title, after the fund has been administered in this Court; he has, under such circumstances, lost that title by the administration of the Court, and his only remedy is in a court of equity.

It is argued, also, that the case is extremely hard upon the party who is to refund, for that he has full right to consider the money as his own, and may have spent it, and that it would be against the policy of the law to recall money which a party has obtained by the effect of a judgment upon a litigated title. There

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(1) 27 R. R. 35 (3 Russ. 130).

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v.  
FROWD.

is here no judgment upon a litigated title; the party, who now claims by a paramount title, was absent from the Court, and all that is adjudged is, that upon an inquiry, in its nature imperfect, parties are found to have a *primâ facie* claim, subject to be defeated upon better information. The apparent title under the Master's report is in its nature defeasible. A party claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right: complaints of hardship come with little force from the party who seeks to support a wrong.

It must be referred to the Master to inquire whether the plaintiff is the sole next of kin, or one of the next of kin, with liberty to state special circumstances.

Regularly speaking, this inquiry ought to have preceded the discussion upon the right of the next of kin; but for the convenience of the parties, I consented to the course which has been adopted; and I must now add to the inquiry a declaration, that if the plaintiff be established as the sole next of kin of the intestate, the defendants are bound to refund to the plaintiff the several sums which they have received under the order of the Court in the suit of *Church v. Frowd*, and that if the plaintiff be established as one of the next of kin of the intestate, the defendants are bound to repay to the plaintiff the amount of the sum which the plaintiff in that case shall appear to be entitled to. The plaintiff, if next of kin, is bound by the accounts which have been taken in the suit of *Church v. Frowd*.

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### VINCENT v. VENNER (1).

(1 Myl. & Keen, 212—214; S. C. 2 L. J. (N. S.) Ch. 49.)

1833.  
Jan. 27.  
—  
*Rolls Court.*  
LEACH, M.R.  
[ 212 ]

An agreement by a defendant to pay the plaintiff costs of suit as between solicitor and client is an agreement to pay taxed costs; and the party paying the costs stands in the same situation with respect to the right of claiming taxation as the solicitor's client.

A BILL was filed by a legatee for the administration of a testator's estate. The petitioner F. Dawson, who was a brother of the plaintiff, and one of the defendants, being desirous of

(1) *In re Grundy & Co.* (1881) 17 Ch. D. 108.

compromising the suit, entered into an arrangement with the plaintiff's solicitor, by which it was agreed that all the claims of the plaintiff, and the costs of the suit, as between solicitor and client, should be satisfied by the petitioner. In pursuance of this agreement, Dawson paid three bills of costs to the plaintiff's solicitor, in respect of which he now prayed by his petition that the Court would grant the common order of taxation. It was admitted that the bills contained charges which would not be allowed on taxation.

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VENNER.

*Mr. Pemberton*, for the petitioner [cited *Balme v. Paver* (1).] A client may, if he think fit, waive his right to taxation; but there was no waiver in the present case, nor can there be any difference between the situation and the \*rights of a client, and those of a third party who pays the solicitor in the client's behalf.

[ \*213 ]

*Mr. Bickersteth* and *Mr. Wakefield*, for the plaintiff's solicitor :

\* \* Where a client taxes his own solicitor's bill, there is no unnecessary disclosure to a third party of the client's affairs; but if a stranger, after having agreed to pay the bill of another party's solicitor, were allowed to procure the taxation of such a bill as between solicitor and client, it is obvious that he might obtain such a knowledge of another person's affairs as the law does not permit. This distinction was recognised in the case of *Clarke v. Thirtill* (2). In *Storie v. Lord Bective* (3) the petition of a defendant who prayed for the taxation of a solicitor's bill under circumstances similar to those of the present case, was dismissed.

#### THE MASTER OF THE ROLLS :

The question is, whether a payment to a solicitor without taxation by a third person differs from a payment so made by the solicitor's \*client. In the case before me of *Storie v. Lord Bective*, which is stated in a note to *Langford v. Nott* (4), I refused an order for taxation, not because I followed *Langford v. Nott*, but because in that case the amount of the bill of costs was stated in the agreement of compromise, and the payment of that amount was

[ \*214 ]

(1) 23 B. R. 73 (Jac. 305).

(2) Rolls, May, 1830.

(3) 1 Jac. & W. 292, n.

(4) 1 Jac. & W. 291.

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a substantive part of the agreement. An agreement to pay the costs of another party, without more, is an agreement to pay such costs as the party would be bound to pay to his solicitor, to be taxed according to the course of the Court. The party agreeing to pay stands in the place of the solicitor's client, and has all his rights to ascertain the just amount of the costs. As the party who employed the solicitor, therefore, would, under the circumstances, have been entitled to taxation, the petitioner, who stands in his place, is equally entitled to taxation.

1894.  
 Feb. 5, 15.  
 Lord  
 BROUGHAM,  
 L.C.  
 [ 237 ]

### HOLLAND v. PRIOR.

(1 Myl. & Keen, 237—248; S. C. Coop. temp. Brough. 426.)

In a suit for an account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or present personal representative.

[A NOTE of this case is retained for the purpose of preserving here the following general observations of the LORD CHANCELLOR upon the point mentioned in the above head-note.]

Feb. 15.  
 [ 240 ]

The LORD CHANCELLOR this day delivered judgment, saying:] Although the general principle of the Court, for preventing multiplicity of suits and avoiding circuitry of proceeding, is to bring all the parties concerned in the subject-matter before it, and to adjudicate once for all among them; and although this would lead in administering the assets of deceased persons, to going beyond the personal representatives, following the estate of the deceased, and taking note of his credits, and consequently bringing forward his debtors; yet the practice of the Court has prescribed bounds to the inquiry; and, accordingly, the rule is to stop short at the personal representatives, unless where there is insolvency, or where other parties stand in such relation to the deceased, or his estate, or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representative after his decease in withdrawing his estate from his creditors, or to have undertaken more directly a *quasi* representation of him.

Within the first of these descriptions come the partners of the deceased, against whom the creditor may go as well as against the executor or administrator. Under the second description falls the case of those who, by collusion with the executors, have received or wasted his property. The last is the case of those who have become executors or administrators of his deceased personal representative. The second case, that of collusion with the executor, may be likened to that of an *executor de son tort*, a representation fixed upon those who intermeddle with the estate as the penalty of their interference, while the last more resembles a direct representation undertaken voluntarily by probate or administration. I say resembles it, and no more, for it is not direct representation of the deceased, except in one case; and to that we are not at liberty to confine it by the \*authorities and the practice; although, certainly, the strict principle would oblige us to do so. Where the party made defendant is executor of the executor, there is a representation of the first deceased; but where either he or the intermediate party is only administrator, the chain of representation is broken, because an administrator is not a representative, but merely an officer entrusted by the consistorial courts. It might, therefore, upon the utmost strictness of principle, be maintained that the executor of an executor ought to be made a party (just as much, indeed, as the first executor himself, for the one mediately represents the deceased, the other immediately); but not the executor of an administrator, or the administrator of an executor, or the administrator of an administrator. The distinction, however, has not been taken; and probably for this reason, that it makes little practical difference in what mode the administration of the estate vests in a party, whether by the ecclesiastical judicature entrusting it, or by the act of the deceased devolving it upon him. There is the same convenience in having him before the Court, and the line is easily drawn which separates both the one case and the other, from that of the body of ordinary debtors. There is, if not a privity in the strict sense of the word, between the first deceased and the personal representative of his administrator, yet, a privity in a sense, a *quasi* privity, and no one can be at a loss to perceive the distinction, or to trace the line which separates

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this case from that of a person merely indebted to the deceased. It must, however, be observed, that where the representative character is material, and must be followed strictly, the incapacity of an administrator either to sustain or to transmit that character is at once perceived. Thus the executor of an administrator cannot bring a suit on behalf of the intestate's estate, nor can he revive a bill brought by the \*administrator *quà* administrator. \* \* \*

[ \*242 ]



1833.

Jan. 16.

*Rolls Court.*  
LEACH, M.R.

[ 249 ]

### WARING *v.* COVENTRY.

(1 Myl. & Keen, 249—253.)

A power of sale, to be exercised during the continuance of successive estates tail, is good.

By a settlement, dated the 6th of August, 1818, certain estates were conveyed to James Alexander and Bryan Holme, their heirs and assigns, [to uses in strict settlement, and the settlement contained a power of sale exercisable by the trustees for the time being] at any time or times during the continuance of the uses and limitations [before declared.]

[ 250 ]

The estates comprised in the settlement having been directed to be sold by a decree in the cause, an objection to the title was made on the part of a purchaser, on the ground that the general power of sale given to the trustees, being a power to be exercised as long as any of the estates limited in the settlement lasted, extended to an indefinite period of time, and was consequently void. This objection was overruled by the Master; and the cause now came on upon an exception to the Master's report.

[ 251 ]

*Mr. Pemberton*, for the purchaser, observed, that the objection to the title in this case was founded upon a doubt which had existed among conveyancers ever since the decision of Lord ELDON in *Ware v. Polhill* (1). \* \* If, however, the Court should be of opinion that the Master was right in overruling this objection, the purchaser was desirous of completing his purchase.

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(1) 8 R. B. 144 (11 Ves. 257). See the note to that case.—O. A. S.

*Mr. Preston*, in support of the validity of the power, mentioned *Powis v. Capron* (1), where his Honour expressed an opinion, that powers of sale collateral to estates tail did not fall within the rule against perpetuities, because the estates tail might at any time be destroyed by a recovery; and *Biddle v. Perkins* (2). \* \* Where the power of sale was collateral to limitations in fee, as in *Boyce v. Hanning* (3), a question of greater difficulty arose,—whether the power which was \*bad to the whole extent of the fee might be partially operative.

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[ \*253 ]

#### THE MASTER OF THE ROLLS:

I adhere to the opinion expressed by me in the case referred to. The power is co-extensive only with the estates tail, and may, like them, be destroyed.

#### THE EARL OF WINCHILSEA v. GARETTY.

(1 Myl. & Keen, 253—276; S. C. 2 L. J. (N. S.) Ch. 115.)

[REVERSED on appeal to the House of Lords under the title of *Nicol v. Vaughan*, as reported in 35 R. R. 60 (1 Cl. & Fin. 495; 6 Bligh (N. S.) 104).]

1833.  
Jan. 14.  
Feb. 12, 14.  
Rolls Court.  
LEACH. M.R.

#### LEITH v. IRVINE (4).

(1 Myl. & Keen, 277—297.)

A mortgagee in possession of a West India estate is not entitled to charge the mortgagor with commission on the amount of bills paid, on the value of the consignments, or on the costs and insurance of supplies shipped for the use of the estate; but stands in precisely the same situation as a mortgagee in possession of an estate in England.

Principles on which the expense of the home management of such estates is to be calculated.

By the decree in this cause it was, among other things, directed that an account should be taken between the parties in respect of a mortgage of certain sugar plantations in the island of Tobago, called the Grange estates. This mortgage had, in the year 1793, become vested in a person of the name of Charles Irvine, who was at the same time let into the possession and receipt of the

1833.  
Jan.  
Feb.  
March 30.  
Lord  
BROUGHAM,  
L.C.  
[ 277 ]

(1) Rolls, May 5, 1830.

(2) See 33 R. R. 103 (4 Sim. 135).

(3) 2 Cr. & J. 334.

(4) Considered by Wigram, V.-C. *Faulkner v. Daniel* (1843) 3 Ha. 218—221.

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rents and profits of the mortgaged premises. Subsequently, his brother and representative, Walter Irvine, and upon the death of Walter Irvine, the present defendants, continued to receive such rents and profits as mortgagees in possession down till a very recent period. The plaintiffs, who were entitled to the equity of redemption of the mortgage, took a great number of exceptions to the report respecting the accounts. Those exceptions, together with certain other exceptions taken by the defendants the mortgagees, who claimed under the Irvines, were argued before the Master of the Rolls, and came ultimately before the Lord Chancellor upon cross petitions of appeal.

The questions raised upon the two appeals, after a very full and elaborate discussion, which occupied the Court for several weeks, were all finally disposed of by his Lordship's judgment: but the only part of the decision which involved any general principle, and which it is therefore material to advert to here, arose on the appeal of the parties who represented the Irvines, and who, as was found by the report, had stood in the situation of mortgagees in possession, with reference to the Grange estates.

[ 278 ]

Upon the taking of the accounts before the Master, a claim was carried in on behalf of the mortgagees to a commission of a half per cent. (which they had charged in their account current), on the amount of all bills drawn by them in Tobago in favour of the mortgagor, and paid by them in London. They also claimed a commission of  $2\frac{1}{2}$  per cent. on the value of the consignments of produce sold by them in England, and a like commission on the cost of the supplies which they had shipped from England for the use of the mortgaged estates. They further claimed a half per cent. commission on the amount of the sums which they had paid for insuring the shipments of produce homewards, and of stores and supplies outwards; and, lastly, they claimed the sum of 4,808*l.* as the amount of various disbursements and charges made and incurred by them for salaries and allowances to clerks and agents, and for the expenses of books and stationery necessary for the management and sale of the consignments of produce at home, and for the shipping of the stores and supplies for the use of the Grange estates. The Master allowed the first of these claims, and disallowed the rest. One of the exceptions

taken to his report by the plaintiffs (being the 29th in number), was grounded on his allowance of the half per cent. commission on the value of bills drawn by the mortgagees in favour of the mortgagor, and paid by them in London: and four exceptions filed by the defendants, being the first, second, third, and fourth of their exceptions respectively, referred to the other three charges for commission, and to the sums claimed for the expenses of management respectively, all of which the Master had disallowed.

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Upon the hearing of the exceptions at the Rolls on the 10th of May, 1881, his Honour allowed the twenty-ninth exception of the plaintiffs, and over-ruled the first \*three exceptions of the defendants. With respect to the fourth, he directed that the Master should inquire, and state whether Walter Irvine, in his lifetime, or the defendants, his representatives, since his death, had incurred any, and what, additional expense either in the hire of a counting house, or in the salaries of clerks, or otherwise, by reason of the administration of the estate in England. And the defendants' petition of appeal applied solely to the orders made by the MASTER OF THE ROLLS upon those five exceptions.

[ \*279 ]

Upon the hearing of this appeal two questions were made: first, how far persons standing in the situation, in which it was admitted the individuals represented by the defendants had stood, of mortgagees in possession of West India estates, were entitled to charge commission in taking the mortgage accounts; and, secondly, to what extent, and in what manner they ought to be reimbursed for expenses which had been incurred by them in England, in the administration of such mortgage estates.

*Mr. Tinney, Mr. Phillimore, and Mr. Duckworth*, for the appellants, the representatives of the Irvines.

*Sir Edward Sugden, Mr. Burge, and Mr. Garratt*, for the plaintiffs, in support of the decree.

The authorities cited and relied upon on both sides are all fully stated and discussed in the LORD CHANCELLOR'S judgment.

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IRVINE.  
March 30.

This day the LORD CHANCELLOR, after delivering at great length a judgment disposing of the various questions \*which had been raised upon the appeal of the plaintiffs, proceeded as follows :

[ \*280 ]

We now come in the last place to the appeal of the defendants. That appeal brings before the Court three exceptions which the defendants had taken to parts of the report, and which the MASTER OF THE ROLLS over-ruled, a fourth exception, of an alternative nature, on which his Honour made an order, referring the matter back to the Master with what the appellants complain of as an insufficient instruction, and, lastly, an order allowing the twenty-ninth of the plaintiffs' exceptions. All these matters comprised in the appeal of the defendants, relate exclusively to two points ; first, to the right of Irvine to commission during the time he was mortgagee in possession ; (the commission referred to in the twenty-ninth exception of the plaintiffs is on bills drawn ; in the defendants' three exceptions, it is on consignments, supplies, and insurances, severally) ; secondly, to his right, should such commission be disallowed, to compensation for the necessary expenses of managing the concerns of the estate in England, upon a more liberal principle than the MASTER OF THE ROLLS has sanctioned ; his Honour having considered the just measure of compensation to be the cost actually incurred by Irvine in consequence of the Grange estates being added to his other mercantile concerns.

The importance of this subject, with reference both to the sums of money at stake and to the principles of law involved in the decision, demands certainly the best attention of the Court ; but I cannot say that I consider the question as incumbered with any great difficulty, or beset with much doubt.

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If, indeed, the law had stood now as it was understood to stand, perhaps twenty, certainly thirty years ago, with respect to the validity of a stipulation for consignments with the commission, in the case of West India loans, there could have been no doubt at all upon the present question. For it was then assumed as clear that no mortgagee or other lender could stipulate for any collateral advantage. [On this point his Lordship referred to *Chambers v. Goldwin* (1), and other cases.] Nor, so far as I know, was any allusion ever made at that period, in any of

(1) 7 R. R. 181 (9 Ves. 254).

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the Courts on either side of the Hall, to the case of West India consignees, as affording an exception to the rule. It should seem, however, that, all the while, a perfectly different understanding prevailed amongst West India planters and merchants, and was acted upon by them. They considered that lending money upon the security of an estate at 6 per cent. interest, with the condition over and above of receiving the consignments and sending the supplies, and charging an ample commission upon both, was neither usury nor tending to usury; \*although it was well known that a much less commission would have been sufficient to recompense the merchant consignee, as such, for all the trouble which the management of the concerns gave him. The commission is, I believe, charged upon the whole consignments, including the duty, and that nearly doubles the amount of the charge. This practice had apparently become universal and of long standing, before the attention of the Courts happened to be directed towards it; and it certainly was well established at the period of the decisions to which I have referred.

[ \*282 ]

The increasing embarrassments of colonial proprietors were not likely to narrow a practice which manifestly had its origin in their difficulties; founded as it was upon the reluctance of capitalists to advance money upon West India property without obtaining at once the enhancement of their security, and the increase of yearly profits which the consignments gave; I say both the one and the other plainly formed the inducement, without which the extraordinary risk would not have been encountered. For the control over the annual produce only improved the security as to the interest; which, even at 6 per cent.,—for many years not a much higher rate than the Funds afforded in this country,—would certainly never have tempted them to plunge into the hazards of West India speculation. All the while, however, that the practice was becoming both general and inveterate, the Courts were treating the law as clearly against it, and shutting their eyes to the evasion. [His Lordship attributed this exceptional treatment of West India consignees to the peculiar circumstances of their position, concluding his observations on that point by saying:] Nor can any man who reads

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*Bunbury and Winter* (1) doubt that the right of West India consignees was then, for the first time, placed judicially upon the same ground which it had occupied practically for a quarter of a century,—was then first recognised as having become an exception, and a most important one, to the rules which had formerly, without any such exception, guided the Courts in dealing with this subject.

[ 285 ] But, admitting that the law may have thus silently been changed at a time which we cannot fix, and by steps which we cannot trace, as to mortgagees out of possession, does it follow, that, therefore, we are now, for the first time, at this known period, and by this well-defined transition, to extend the same change to the case, materially, at least sufficiently distinguishable, of mortgagee in possession?

The argument seems to amount to this: It is admitted, on all hands, that the mortgagee in possession of an English estate cannot charge commission in any way; no more can the mortgagee of such an estate out of possession. But it has lately been held, that a mortgagee of a West India estate out of possession may charge commission; then why not also mortgagee in possession? or, which is the same argument in another form, the Court, at the time when it held that mortgagee in possession generally could not so charge, held, that the West India mortgagee out of possession was in the same predicament. Had the Court then supposed that the latter was entitled to charge, it never would have decided against the former. This is the sum and substance of the argument.

I own that I do not feel the force of this reasoning to be conclusive; admitting, as I am obliged to do, that it interposes some difficulty, and that the variation which has taken place in the opinions of the Court respecting West India commission, owing to the unsuitableness of the law to the circumstances of the country, is calculated to cast some doubt upon the question. There are differences in the situation of the two kinds of mortgagees sufficient to support a different rule in their several cases, as long as the law remains unaltered, and the cases

[ \*286 ]

laying down the rule, in a clear and peremptory \*manner,

(1) 21 R. R. 159 (1 Jac. & W. 255).

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remain unimpeached. For the reasons I have partly given, and am in part yet to give, I shall decline being the first to overrule them, the first at least in this Court.

It never has been doubted that a mortgagee in possession is precluded from deriving any profit by charging for his trouble, though his services may have benefited the estate: nay, although, had he not rendered them, the services of another would have been required, and would have cost the estate as much. Lord Keeper NORTH laid down this principle clearly in *Bonithon v. Hockmore* (1), and Lord HARDWICKE afterwards said, in *French v. Baron* (2), that an agreement between mortgagor and mortgagee that the latter should have an allowance as receiver, would not be carried into execution by the Court. The same learned Judge, in *Godfrey v. Watson* (3), distinctly stated the rule of the Court to be, that where a receiver or bailiff was required, the mortgagee in possession might employ him, and debit the estate with what was necessary to pay him, but could not credit himself with such payments for his own trouble if he chose to do the business himself. This has been at other times expressed by saying that the mortgagee in possession is a bailiff without a salary, accountable to the mortgagor, but not paid by him: *Davis v. Dendy* (4), *Quarrell v. Beckford* (5); and the same expression, I am confident, is reported in one of the old cases, although I have not been able to turn to it.

If the only ground of this doctrine were, that the allowance of such stipulations or of such charges opened a door to usury, the argument would be much stronger \*for extending to the case of mortgagee in possession the exception which has been made in favour of West India mortgages. But there is another ground; the mortgagee, by taking possession, changes the relation in which he stands to the estate; he becomes *quasi* owner. He is in some sort likened to a trustee; not that he can with any correctness of speech be called a trustee. The distinction is well and forcibly expounded in *Cholmondeley v.*

[ \*287 ]

(1) 1 Vern. 316.

(4) 18 R. R. 209 (3 Madd. 170).

(2) 2 Atk. 120.

(5) 16 R. R. 214 (1 Madd. 269).

(3) 3 Atk. 518.

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*Clinton* (1), by Sir THOMAS PLUMER in his able and elaborate judgment, and his Honour's exposition is adopted generally by Lord ELDON in moving the affirmance of the judgment. In truth, till the debt is paid off, the mortgagee in possession cannot be considered at all as a trustee. Nevertheless, all the authorities place him in the same predicament with a trustee as far as incapacity to charge for trouble is concerned. Thus Lord Keeper NORTH, in the case referred to (2), observes, "Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care or pains:" and Lord ELDON was so much impressed with the similarity of their situations in some respects, that both in *Chambers v. Goldwin* (3), and *Cholmondeley v. Clinton* (4), while he refers to that resemblance, he seems hardly to think himself safe in considering them to be different. In the former case he speaks of "the trust, if it is a trust;" and in the latter he more than once says, "not strictly a trustee," and contrasts a mortgagee with what he terms "a strict trustee."

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A mortgagee may be, either before default, tenant in mortgage, or after default and before possession, in \*which state he is, as regards our present purpose, a mere creditor having a lien upon the estate, and being entitled to take possession; or he may be, after possession and before payment of his debt, in which state he is a *quasi* owner, and is holding the estate for his own purpose of working out his own satisfaction; or he may be in, after payment of the debt, and then he is a mere trustee.

When the creditor has reached the third stage, that of having taken possession of his mortgage, he abandons the position he before held, of a mere creditor having a lien upon the estate for his principal and interest, and having a right at any time better to secure his satisfaction, by putting himself in his debtor's shoes. So long as he stood thus, there was nothing inconsistent in his being employed for a certain reward in the management of the estate, and provided he did not make that

(1) 22 R. R. 84, 94 (2 Jac. & W. 1, 316.  
182).

(3) 7 R. R. 181 (9 Ves. 254, 271).

(2) *Bonithon v. Hockmore*, 1 Vern.

(4) 22 R. R. at p. 101.

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employment a condition of forbearing the demand of his debt, there was nothing to prevent him from taking that reward. But when once he takes possession, he assumes a different character; all he does is for himself, and he is not at liberty to charge the mortgagor, whom he has ousted, with the trouble which he takes on his own account. Such a proceeding would be like making a charge against himself; it would open a door to imposition, and even oppression; the owner would have no security against over-charges on the part of the possessor, who is not a trustee for the owner in the ordinary sense of the term, but is placed in the situation of having the owner's interest of necessity very much confided to his care. The owner must needs rely upon the mortgagee in possession, because he has no right to interfere with the operations of the latter, unless some act be committed which calls for the interference of the Court. As long as the necessity for employing a person as bailiff, receiver, or consignee is plainly substantiated; and, further, as long as the person so employed is an \*individual distinct from the mortgagee who retains and pays him, so long there is some check upon imposition; and the mortgagor, at whose expense this is done, may be considered as tolerably safe. But were the mortgagee, in his almost uncontrolled management, to have the power, as it were, of hiring himself, the check, such as it is, would be entirely removed.

[ \*289 ]

This, or something like this, I take to be the foundation of the rule, independently of the point of usury, or tendency to usury. If, however, the rule rested upon that ground alone, the authorities are so precise that I should not feel myself justified in extending the exception made in the case of West India consignees, beyond the point to which it has already been carried, and which stops short of the case of mortgagee in possession. For if a rule has once been laid down or recognised, whether by the known doctrines of the common law, or by express enactments of statute, or even by the current of judicial decisions interpreting or applying statutory provisions, a manifest and admitted exception to that rule introduced by later decisions must, I think, be construed strictly, and is not to be extended merely upon the ground that the same reason

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which led to the old exception may justify the new; or, in other words, upon the ground that they who thought fit to introduce the one might probably have also introduced the other, had the occasion presented itself. This is the kind of argument which must here be relied upon in support of the claim of the mortgagees.

[ \*290 ]

It cannot be pretended, that any case has occurred in which the mortgagee in possession of West India estates, any more than of other estates, has been allowed to stipulate for commission. But because the mortgagee out of possession of West India estates has been allowed to stipulate for commission, which another mortgagee cannot lawfully do (assuming that usury or tendency to usury is the only reason against such a charge in the case of both classes of mortgagees), it is said that those who allowed the exception in favour of a West India mortgagee out of possession ought also to have allowed it in favour of a West India mortgagee in possession, because the same argument applies equally to both.

But this is a dangerous manner of reasoning, and one which is to be discouraged, as shaking rules and setting principles loose; although it must be admitted that courts of justice always expose themselves to the risk of having such reasoning used in extension of their decisions when those Courts deviate from their proper office of applying the law, and choose to extend, and to mould the law, and, in truth, to make it. There is no necessity for resting the decision which I am here giving upon this ground, because the principles applicable to the two situations of the mortgagee are not the same; but if they were, and if the rule which has been applied to both were admitted to rest upon the same consideration,—usury or tendency to usury,—I should not, upon that argument alone, stretch the exception—the avowed exception—so wide as to cover the case which, as yet, it has never in any decision of this Court been permitted to include.

I have referred already to the decisions and the *dicta* respecting mortgagees in possession generally. Touching those of West India estates, it is sufficient to observe, that prior to the case of *Bunbury v. Winter* (1), there is not to be found in the books any

trace of an exception in favour of mortgagees out of possession; and to them \*alone the *dictum* in that case applies. *Chambers v. Goldwin* (1), at the Rolls, and yet more distinctly in this Court, is a direct authority upon the question at Bar; and there is no force or validity in the argument that, because what fell from Lord ELDON, in 1804, shews that his Lordship would then have meted to mortgagees out of possession a different measure from that which he was disposed to give them sixteen years afterwards in *Bunbury v. Winter*, what he did determine respecting mortgagees in possession at the former period must, therefore, go for nothing. The fact of the actual decision remains, and the answer is altogether matter of speculation.

But a doubt has been raised upon this case of *Chambers v. Goldwin*, founded on the report of it in its earlier stage, at the Rolls. Over one part of Lord ALVANLEY's judgment there hangs a little obscurity, where he gives as a reason for approving of the prohibition (in the Jamaica Act) against mortgagees in possession charging commission, other than what they pay out of pocket to the factors, that "every one who attends the Cockpit must know the great advantage that results from the possession taken under a mortgage of a West India estate, having the consignments," &c. It is argued, that the advantage to which Lord ALVANLEY here refers, as the reason for excluding the mortgagee from "commission for management and transactions," is the commission on consignments. I do not, however, think that this is the fair construction, or one consistent with what Lord ALVANLEY says, either in that or in the subsequent passage (2), where he lays it down broadly that no commission whatever should be charged by Goldwin, except so much as he paid to others. And \*certainly Lord ELDON, when the case afterwards came into this Court, took the same view of the matter.

The other case of a West India mortgage which has been cited, *Cox v. Champneys* (3), bears quite as much against as for the argument it was used to support; and then there only remains the decision at the Cockpit in *Sayers v. Whitfield* (4). To this the

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[ \*291 ]

[ \*292 ]

(1) 7 R. R. 181 (5 Ves. 834; 9 Ves. 254).

(2) 5 Ves. 838.

(3) 23 R. R. 145 (Jac. 576).

(4) 1 Knapp, P. C. Cases, 133.

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greatest respect is justly due; and it would be a regulating judgment, if the report did not shew that the difference in the situation of mortgagee in possession, on which the whole of the present question hinges, had never been taken into consideration, and that the point was supposed to have been determined in this Court by decisions which really were either never made, or went upon different grounds.

[ \*293 ]

The long and various litigation in *Fuller v. Willis* (1), which occupied so much attention, both here and at the \*Rolls, for several years, and under a succession of Judges, appears very material to be considered. It is true that the present question was not there distinctly raised and decided; but it is equally true that the great ground of contention between the parties—the main inducement on the one side to establish, and on the other to resist, the proposition that Willis and Waterhouse were in possession of the estates,—would have been nearly, if not altogether destroyed, had not the possession been understood to defeat all right to commission. It was assumed, on all hands, that the being or not being in possession was decisive or destructive of the right to charge commission. It must not be forgotten, that besides the two full hearings before different Masters of the Rolls, each of whom pronounced an elaborate judgment, and the argument before a third, who did not decide,

(1) *Fuller v. Willis* was the case of a bill filed for the purpose of setting aside the decree, and opening the mortgage accounts in a suit in the Court of Chancery in Jamaica, on the ground of fraud in the conduct of that suit. The accounts had been taken on the principle of considering Messrs. Willis and Waterhouse as mortgagees and consignees merely, and not as mortgagees in possession; and with a view to impeach the correctness of the proceedings in that respect, it became material to shew that a person of the name of Queenborough, who had managed the mortgaged estates for many years, had been in possession of them, not on behalf of the owner,

Mr. Fuller, but on the behalf and as the agent of Willis and Waterhouse, the mortgagees. The judgment of Lord BROUGHAM, C. (20th June, 1831) reversing the decision at the Rolls, and refusing to open the accounts, went eventually on the ground, that whatever irregularities or mistakes might have been committed in the course of the foreign suit, the allegations of fraud were not established in evidence; and that the Court of Chancery in England had no jurisdiction as a court of appeal, to review the decrees of the Court of Chancery in Jamaica, merely because they had proceeded on ignorance of facts or error of law.

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there were two arguments yet more full and elaborate in this Court, and that, whatever doubt may exist as to the ground taken on either side below, the materiality of the question as to commission, was distinctly known and felt long before the cause came here. Yet all proceeded upon the assumption, that if Willis and Waterhouse, the mortgagees, were in possession, commission could not be charged.

It is said that the practice in the West India trade is for all mortgagees to charge such commission, whether they are in possession or not. The inquiries which I have made shew that the instances of mortgagees taking possession are so few, as hardly to furnish any thing like evidence of what can be called a usage. Nevertheless, I must add, that of the very few instances where possession has been taken, nearly all (there are some exceptions) have been cases of commission charged and allowed by the planter, who, it must be observed, is generally a person more or less in the power of his creditor consignee.

It is no part [of] the duty of this Court to alter the law, so as to accommodate it to the varying circumstances of society: and that is law to me which I find established by those who have gone before me, whether by the Legislature, or by my predecessors in whose time the principles of the Court have been reduced to a system.

[ 294 ]

If a lawgiver has forbidden certain things as being usury (I am speaking of this case in one of its aspects only), or if the Court has forbidden other things as leading to usury, and tending to defeat the lawgiver's purpose, both may be wrong; the one in framing unwise rules, the other in overstepping the bounds of its duty in order to enforce or protect those rules; but the remedy for either evil is to be sought from the Legislature alone. Neither the makers of the law will carefully perform their duty, nor will its expounders with adequate caution discharge theirs, if the former are made to believe that their deficiencies can always be supplied by judicial misconstruction; and if the latter are taught to expect that the consequences of their adapting the law to the circumstances of the day will be counteracted by their successors either retracing their steps or advancing to future changes. My resolution is, to abide by

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what I find to be the law, whether it has been promulgated on the record of the statute or of the Court, and to leave the Legislature to alter it, if alteration be required.

[ \*295 ]

In deciding *Bunbury v. Winter* (1), I felt as I now do upon this subject; but the circumstances and the authorities \*seemed there to leave me no choice, no possibility of drawing the line and stopping exactly where those had stopped: and the decision to which I have here come will be found quite consistent with the principles which are fairly deducible from the judgment in that case.

What has now been said will carry us some, but not the whole way towards disposing of the other point raised by the defendants' appeal,—namely, with respect to the direction given to allow the mortgagee in possession only so much as the management of the estate can be proved to have cost him.

It is plain that the mortgagee can charge nothing for his own trouble or superintendence in any way: it is equally certain that for necessary expenses to which he has been put he may charge. The question arises upon the manner in which these shall be reckoned. If he chooses to be consignee himself, he has no commission; if he employs another, as there must be a consignee, that consignee's commission may be charged. It cannot, therefore, be at all admitted that the gain to the estate is the measure of the right to charge; for the estate would gain by saving the consignee's commission, if the mortgagee were himself consignee; and yet he could not, on that account, charge it. So, if he chooses to be his own clerk, and to do the clerk's business, he is not at liberty to charge; but he may employ a clerk, and make the estate pay the cost. In the present case Mr. Irvine happened to have an establishment of counting-house and clerks, independent of the mortgaged estates' concerns, and before he took possession; and it must be extremely difficult to say what, if any, addition to the cost of this establishment such possession occasioned to him.

(1) Determined by Lord BROUGHAM, C. upon appeal from the Rolls, January 25, 1832, when his Lordship pronounced a judgment following

out the principles laid down by Lord ELDON on the motion (21 R. R. 159; 1 Jac. & W. 255), and affirming the decision of the Court below.

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 [ 296 ]

If a mortgagee takes possession of an estate in this country, and hires a bailiff necessary to manage it, he may charge the reasonable salary of the bailiff, if actually paid. Suppose he had an estate of his own so near to the mortgaged property that one bailiff could manage both. According to the rule laid down by his Honour for the Master's guidance, this mortgagee could not charge any part of the bailiff's salary; and yet it seems impossible to deny, that not only the estate gains, but the mortgagee, as owner of the other estate, suffers by the subtraction of part of his servant's attention, though it may be impossible to estimate the value of this in money. And still more does a mercantile man suffer by his clerks and his establishment generally being loaded with a new concern, although he may not employ a greater number of persons. Even if he employs one more, he may still lose in a larger proportion than the wages of that one; he may, for example, be prevented from taking other consignments for the usual commission. It appears to me that the more fair and more accurate rule is, to apportion the whole expense of the trading establishment among the whole of the concerns managed by means of it, and to allot to each its rateable proportion of the expense. And I think the inquiry ought, on this principle, to be into the proportion which the consignments and supplies of the Grange estates bore to the whole consignments and supplies under Mr. Irvine's management. The invoices and bills may obviously be omitted in the calculation; for we are seeking only a proportion, which the consignments and supplies will best furnish. The sum which the mortgagee should be allowed to charge will be in that proportion to the whole expenses of his establishment.

The result, therefore, is, that the orders upon the defendants' three first exceptions, and upon the plaintiff's \*twenty-ninth exception, are affirmed; but, in respect of the conflicting decision at the Cockpit in *Sayers v. Whitfield*, the costs of the appeal cannot be allowed; and the order on the fourth exception of the defendants must be varied, according to the principle which has been laid down.

[ \*297 ]

1833.

Feb. 23.

March 5.

FOSTER *v.* BLACKSTONE.

(1 Myl. &amp; Keen, 297—311; S. C. 2 L. J. (N. S.) Ch. 84.)

*Rolls Court.*

LEACH, M.R.

[THIS case was affirmed on appeal to the House of Lords under the title of *Foster v. Cockerell*, as reported in 3 Cl. & Fin. 456; 9 Bligh (N. S.) 383, to be contained in a later volume of the Revised Reports.]

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1833.

Feb. 15, 26.

March 4.

ATTORNEY-GENERAL *v.* THE MASTER OF BRENTWOOD SCHOOL.

(1 Myl. &amp; Keen, 376—395.)

*Rolls Court.*

LEACH, M.R.

[ 376 ]

[ 394 ]

[ \*395 ]

[In this case in the course of his judgment directing a scheme to be prepared for the application of the revenues of a charity, the MASTER OF THE ROLLS said:] It is the settled principle of this Court in the administration of charity property, given not for purposes of individual benefit but for the performance of duties, that, if the revenues happen to increase so as to exceed a reasonable \*compensation for the duties, the surplus must be applied to other charitable purposes. \* \* \*

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1833.

March 19.

VAUGHAN *v.* WOOD.

(1 Myl. &amp; Keen, 403—409; S. C. 1 L. J. (N. S.) Ch. 107.)

*Rolls Court.*

LEACH, M.R.

[ 403 ]

Where a bond is given by the borrower of a sum of stock, to secure the re-placement of the stock, and payment in the mean time of sums equal to the interest and dividends, and a bonus is afterwards declared upon the stock, the lender has an equity to be placed in the same situation as if the stock had remained in his name, and is consequently entitled to the re-placement of the original stock increased by the amount of the bonus, and to dividends in the mean time, as well upon the bonus as upon the original stock.

THE bill was filed by a bond creditor, on behalf of himself and all other specialty creditors of the testator, John Wood, for the administration of the testator's estate, and a decree was made directing the usual accounts. The testator had carried on the business of a banker at Cardigan in partnership with the defendant, his son, John Wood the younger; and in the month of June, 1815, being called upon by Messrs. Robarts & Co.,

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their correspondents in London, to give security for their account with them, Messrs. Wood applied to the plaintiff, John Edwards Vaughan, to lend them a sum of 1,850*l.* Bank stock, to be transferred to Messrs. Robarts & Co. as such security. This sum of stock was, in compliance with the request of Messrs. Wood, transferred into the names of the latter by the plaintiff on the 14th of June, 1815, and the testator John Wood and the defendant John Wood the younger thereupon executed a joint and several bond to the said John Edwards Vaughan in the penalty of 4,000*l.*, conditioned to be void if the said John Wood the elder, and John Wood the younger, or either of them, their or either of their \*heirs, executors, or administrators, should, on the 14th day of December then next ensuing purchase or transfer, or cause to be purchased or transferred, the sum of 1,850*l.* in the capital stock or funds of the Governor and Company of the Bank of England, commonly called Bank stock, into the name or names of the said John Edwards Vaughan, his executors, administrators, or assigns, and should in the mean time pay or cause to be paid to the said John Edwards Vaughan, his executors, administrators, or assigns, such a sum or sums of money as the said John Edwards Vaughan would have been entitled to receive as and for the interest and dividends of the said principal sum of 1,850*l.* Bank stock, if the same had remained standing in his name, on or at the days and times when the dividends would have been payable thereon, without any deduction or abatement whatsoever out of the same sum of 1,850*l.* Bank stock, or out of such sum or sums of money, to be payable in respect of such interest or dividends as aforesaid, or any part thereof respectively, or in respect of any present or future taxes, charges, assessments, or impositions whatsoever, except the property or income tax.

[ \*404 ]

On the 1st of August following, John Edwards Vaughan lent a further sum of 900*l.* Bank stock to Messrs. Wood, as an additional security to Messrs. Robarts & Co. ; and upon that occasion the testator John Wood the elder, and the defendant John Wood the younger, executed another joint and several bond to the plaintiff in the penalty of 3,000*l.*, conditioned to be void on the re-transfer

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[ \*405 ]

of the said sum of 900*l.* Bank stock by the obligors, or either of them, or their or either of their heirs, executors, or administrators, on the 1st of August, 1816, and upon their paying in the mean time to the said John Edwards Vaughan, his executors, administrators, or assigns, such sum or sums of money as he \*would have been entitled to receive as and for the interest or dividends of the 900*l.* Bank stock, if the same had remained in his name on or at the days or times when such dividends would have been payable.

By an indenture of even date with the last-mentioned bond John Wood the elder, and the defendant John Wood the younger, conveyed certain premises therein mentioned to John Edwards Vaughan and his heirs, subject to redemption on the re-transfer of the two sums of 1,350*l.* and 900*l.* Bank stock to John Edwards Vaughan, his executors, administrators, or assigns, on the 1st of August, 1816, and payment of the interest and dividends in the mean time.

In the year 1816, and previously to the 1st of August in that year, the Governor and Company of the Bank of England declared a bonus of 25 per cent. on all Bank stock, with interest on such bonus to be paid from the 10th of October, 1816. The two sums of 1,350*l.* and 900*l.* Bank stock had been transferred by Messrs. Wood to Messrs. Roberts & Co., and by the effect of the bonus these sums were increased in the Bank books from the sum of 2,250*l.* to the sum of 2,812*l.* Bank stock.

Messrs. Roberts & Co., from the time of the transfer to them of the two sums of stock, paid the dividends thereof, on the account of Messrs. Wood, to the plaintiff John Edwards Vaughan; and from the 10th of October, 1816, they paid to the plaintiff the dividends on 2,812*l.* Bank stock, being the amount of the two sums of stock increased by the bonus.

The testator, John Wood, the elder, died on the 27th of April, 1817, having by his will appointed the defendant and Nicol Wood his executors.

[ 406 ]

In 1821 John Edwards Vaughan entered into possession of the mortgaged premises, and received the rents thereof, and soon afterwards Messrs. Roberts & Co. sold the two sums of stock

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WOOD.

together with the bonus, and carried the produce to the account of Messrs. Wood.

In 1827, John Edwards Vaughan, in exercise of a power given to him in the mortgage deed, sold the mortgaged property for a sum of 5,908*l.* 11*s.* 4*d.*

At the time of the claim of John Edwards Vaughan before the Master under the decree, there remained due to him, after applying the 5,908*l.* 11*s.* 4*d.* in reduction of his debt, so much money as would be required to purchase a sum of 191*l.* Bank stock, upon the principle that he was to have replaced, not only the two sums of 1,350*l.* and 900*l.* Bank stock, but also the sums added thereto by way of bonus, which had been sold by Messrs. Roberts & Co. with the original stock; and the Master having reported accordingly, the case now came before the Court upon an exception taken by the defendant to the Master's report.

*Mr. Bickersteth*, in support of the exception. \* \* \*

*Mr. Pemberton* and *Mr. Hayter*, *contrà* :

[ 407 ]

\* \* It is clear that the plaintiff would have been entitled to the benefit of the bonus, had the stock remained standing in his name; and even if the strict language of the bonds admitted of a different construction, it would be most inequitable that the lender should be placed in a worse situation, in consequence of the assistance which he afforded to the borrowers.

[ 408 ]

*Mr. Bickersteth*, in reply, insisted that neither at law, nor in equity, could the penalty of a bond be enforced, if the principal sum and interest secured by it were paid; and that in no instance had a court of equity ever given to a bond a construction larger than the terms of the instrument would warrant, on the ground of some supposed equity in the obligee to call for the performance of something *ultrà* the payment of such principal sum and interest. \* \* \*

THE MASTER OF THE ROLLS :

[ 409 ]

The intention of the parties that Mr. Vaughan should be placed in the same situation with respect to the capital sum

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of stock, and the interim dividends as if the stock had remained in his name, admits of no doubt. It may be questionable whether the language of the conditions of the bonds will not legally bear that construction, but the equity of the case is clear; and the bonds being forfeited at law by the default of transfer on the days mentioned in the conditions, the penalties of the bonds would have secured that equity.

Suppose the mortgagors had filed a bill to redeem the mortgaged premises; a court of equity would certainly not have permitted the redemption, unless the mortgagee had been placed in the same situation as if he had never made the loans of the stock. The exception, therefore, must be

*Over-ruled.*

1833.  
 March 30.  
 April 1, 3, 15.

Lord  
 BROUGHAM,  
 L.C.  
 [ 410 ]

# IN THE MATTER OF THE PARISH OF UPTON WARREN.

(1 Myl. & Keen, 410—415.)

An annual sum was given to trustees, to be paid as an apprentice fee for a boy who should be chosen out of a particular parish; failing which, out of certain other parishes; and in default of the sum being claimed, then for the benefit of Christ's Hospital. The sum was not claimed for many years, and considerable arrears accumulated in consequence: Held, that Christ's Hospital was not entitled to the arrears, but that they ought to be applied according to a scheme for the benefit of the specified parishes in the first place.

Upon a petition under the 52 Geo. III. c. 101, the Court will adjudicate between the conflicting claims of different charities, where the point to be decided is simply a question of law depending on the construction of a particular instrument (1).

An objection to the jurisdiction under that statute, if not raised in the Court below, will be very reluctantly entertained on appeal.

By an indenture, dated the 1st of November, 1656, made between John Sanders, Alderman, and the Grocers' Company of London, reciting that the said John Sanders had agreed upon his annual gift of 10*l.* for ever, to commence the first day of May next after his decease, for the yearly placing and binding of a poor boy, born of decayed parents, dwelling in the parish of Upton Warren (where the said John Sanders was born), and that could write and read, between the ages of fourteen and seventeen years, as an apprentice with a freeman in London; and when such a boy could not be found in Upton Warren, then

(1) Cp. *In re*, West Retford Church Lands (1841) 10 Sim. 101.

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for the placing and binding as an apprentice in like manner a boy similarly qualified from the parish of Stoke Prior, and, in default thereof, from the parish of Chadgley; and reciting, that the said supplies out of Stoke Prior and Chadgley were to be made alternative and successive each to other, upon every failure out of Upton Warren; and every election and choice, placing and binding should be made, perfected, and finished upon every first day of May yearly, or within 120 days next thereafter; and further reciting, that the said John Sanders, confiding in the integrity and uprightness of the minister, churchwardens, and inhabitants of the said parish of Upton Warren, and of their successors, in and for the better disposing of the said gift in manner and form before declared, had \*appointed and agreed that the yearly election of such poor boy out of Upton Warren, or, in default thereof, out of Stoke Prior and Chadgley, in their respective turn, should be always made by the minister and churchwardens of the parish of Upton Warren for the time being, and of five more of the inhabitants thereof, or the major part of such electors, which five persons were to be from time to time, by the choice of the major part of the parishioners of the parish, added to the minister and churchwardens; and further reciting, that the said John Sanders had great trust and confidence in the justice and uprightness of the wardens and commonalty of the said Grocers' Company; it was witnessed that, for the considerations therein mentioned, the said wardens and commonalty, and their successors, should and would, from and after the decease of the said John Sanders, yearly and for ever pay a yearly gift of 10*l.* unto the said master of such apprentice as should be that year chosen, placed out, and bound, upon his demand thereof, and presenting and shewing the same apprentice unto the wardens of the said Company for the time being, or one of them, with due certificate under the hands of the major part of the electors, or other sufficient proofs of such election, choice, placing out, and binding as an apprentice, in manner and form aforesaid, at and on every first day of May next following the decease of the said John Sanders, or at any time after, upon such demand and proof made as aforesaid, within the space of 120

[ \*411 ]

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UPTON  
WARREN.

days next following after every first day of May; and, in default of presentment, tender, and proof as aforesaid, then, upon every neglect and failure therein, to pay and satisfy the same 10*l.*, so neglected and failed to be disposed of as aforesaid, unto the treasurer of Christ's Hospital, London, for and towards the relief and maintenance of the poor children in that house.

[ 412 ]

For many years the Grocers' Company applied the annual sum of 10*l.* in apprenticing out a poor boy sent from the parish of Upton Warren, according to the trusts above stated; but the deed itself was supposed to be lost, and its particular provisions were not accurately known. Latterly, no applications were made for the premium, and from the year 1794 downwards it had not been claimed; and an arrear of thirty-eight years having accumulated, a petition was presented on behalf of Upton Warren, under Sir S. Romilly's Act, praying that the Grocers' Company might pay up the arrears, and that the charity might be regulated and a scheme settled for carrying into effect the intentions of the founder in a manner better suited to the habits of the times.

In the course of the inquiries to which this proceeding gave rise, an attested copy of the indenture establishing the charity was discovered among the muniments of Christ's Hospital; and that institution having set up a claim to the arrears, founded on the limitation over to their treasurer in default of the nomination of an apprentice out of the specified parishes, and having appeared by counsel, the question was argued before the Vice-Chancellor on the petition. His Honour decided against the claim, on the ground that Upton Warren was the primary object of the donor's bounty, and that the two substituted parishes had no notice of the lapse, or of the rights which accrued to them on that event; and he referred it to the Master to consider of a scheme.

A petition of appeal was presented on behalf of Christ's Hospital.

[ \*413 ]

*Mr. Agar* and *Mr. Phillimore*, in support of the appeal, submitted that the Court had no jurisdiction, \*upon a petition presented under Sir S. Romilly's Act, to decide a nice and

difficult point of construction involving the rights of different charities, [and cited *The Corporation of Ludlow v. Greenhouse* (1), and *Ex parte Rees* (2).] Upon the question raised by the present petition, if that were now to be discussed, it was enough to state the clause containing the limitation over to the Hospital in default of the due nomination of an apprentice, the language of which was clear and express.

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WARREN.

Sir E. Sugden and Mr. Bethell, for Upton Warren, and Mr. O. Anderdon, for the other parishes, in support of the order, contended, that [the charity now only sought the direction of the Court in the disposal of the arrears.] A clause of forfeiture with a gift over was to be construed strictly, especially where the ulterior charity had been so extremely remiss in asserting its claims and protecting its own interests. Nor could such a clause be allowed to operate to the prejudice of the parties whose interest was interposed between those of Upton Warren and the Hospital, and who, it was undisputed, had no knowledge of the particular provisions of the instrument or of the rights which they took under it.

[ 415 ]

THE LORD CHANCELLOR :

April 15.

In this case I entertain little or no doubt except upon the question of jurisdiction now raised at the eleventh hour; a period at which such an objection ought to be very clear indeed in order to prevail. With respect to that point, however, I am very far from conceding it to be, as has been argued, clearly in the appellant's favour. On the contrary, after looking into the cases referred to, particularly the one in the House of Lords, and the words of the preamble of the Act of Parliament, I am by no means satisfied that the language ascribed to Lord REDESDALE, in delivering judgment in the *Corporation of Ludlow v. Greenhouse*, is sufficient to support the objection to the present mode of proceeding; more especially when I consider the subject-matter of this petition and the nature of the question which has been raised upon it.

The appeal must, therefore, be

*Dismissed with costs.*

(1) 30 R. R. 7 (1 Bligh (N. S.) 17).

(2) 13 R. R. 132 (3 Ves. & B. 10).

1833.  
Feb. 23, 28.

Lord  
BROUGHAM,  
L.C.  
[ 431 ]

### CROSBIE *v.* TOOKE (1).

(1 Myl. & Keen, 431—434 ; S. C. 1 Mont. & A. 215, n. ; 2 L. J. (N. S.) Ch. 83.)

It is no defence to a bill, filed against a landlord for specific performance of an agreement for a farming lease, by a person to whom the benefit of the agreement has been assigned, that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent, and in a condition to enter into the usual covenants, and there is no evidence that the contract was entered into upon considerations personal to the assignor.

In the month of September, 1831, the defendant Tooke and a person of the name of Bickmore entered into an agreement (which, on the 26th of the same month, was reduced to writing and signed by the parties), whereby Tooke agreed to grant, and Bickmore to accept, a lease of a farm and premises at Little Burstead for a term of fourteen years, at a yearly rent of 140*l.* Under this contract Bickmore took possession of the farm ; and, in the month of April, 1832, he, for valuable consideration, executed an assignment of all his interest in the farm and premises, and in the benefit of his contract for a lease thereof, to William Crosbie, who was thereupon let into possession ; and Tooke having soon afterwards brought an ejectment against Crosbie, the present bill was filed by the latter for a specific performance of the agreement for the lease, and for an injunction against legal proceedings in the meantime. From the answer of Tooke it appeared that Bickmore, at, or shortly after the date of the assignment to Crosbie, had become insolvent ; and the VICE-CHANCELLOR, being of opinion that Tooke was released from his contract in consequence of the insolvency of Bickmore before any lease had been executed, his Honour dissolved the injunction.

A motion by way of appeal was now made on behalf of the plaintiff, that the VICE-CHANCELLOR's order might be discharged and the injunction revived.

[ \*432 ] *Mr. Pepys* and *Mr. Bethell* for the motion contended, that the subsequent insolvency of Bickmore, the original \*lessee, afforded no valid reason why the defendant should not be now compelled to perform his contract specifically for the benefit of

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the plaintiff, whose solvency was not disputed, and who claimed by a title derived from that lessee. If the lease had been executed, it must have been drawn in the common form, and would not have contained a covenant against alienation, for no such stipulation was to be found in the agreement. As the lease to be granted, therefore, would have been assignable, the contract itself must be equally so. It was true that if the lease had been executed immediately after the parties entered into the contract, the defendant would have had the covenant of Bickmore for the rent; but as Bickmore had become insolvent, instead of that covenant of which the event proved the worthlessness, the defendant would now have the covenant of Crosbie, a responsible and solvent tenant, and would, in truth, stand in a better situation than if the lease had been made to the party with whom he originally contracted.

*Sir Edward Sugden* and *Mr. Jemmett*, *contra*, insisted, that, as the defendant's agreement with Bickmore contained no authority to assign, it was of a purely personal character; and, so long as matters rested *in fieri*, that character continued. Bickmore, it was admitted, was not in a situation to call for a specific performance, inasmuch as his insolvency had disabled him from executing his part of the agreement, and the plaintiff, who claimed by assignment from him, could have no better equity than his assignor. There was no mutuality between these parties. If the plaintiff, notwithstanding Bickmore's assignment, had chosen to repudiate the contract, the defendant could never have compelled him to complete it: nor could the execution of a lease, in which were inserted the usual covenants by the \*plaintiff for payment of the rent, &c., be, with any propriety of speech, described as a specific performance of the defendant's original contract with Bickmore, which the present bill pretended to enforce. The insolvency of Bickmore, therefore, must be considered, as the VICE-CHANCELLOR had considered it, to operate as determining the agreement altogether.

[ \*493 ]

THE LORD CHANCELLOR :

Feb. 28.

I have looked minutely into the circumstances of this case

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with a view to ascertain whether there was any thing, either in the dealing of the parties or in the instrument itself, to justify the defendant's contention that this was a contract made by the landlord specially and personally with Bickmore. But I have been unable to discover any thing which should differ the interest here contracted to be given from that which any tenant would have under a common farming lease. The case is, therefore, left to rest upon the ground upon which it was decided in the Court below; and I am clearly of opinion, that the circumstance of the party who originally contracted having assigned his interest cannot be taken into consideration, provided (which is the fact here) the assignee be admitted to be a person in solvent circumstances, and able to enter into the covenants in the proposed lease, and that the insolvency of the assignor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. That doctrine, which seems to have been approved by Lord LOUGHBOROUGH in *Brooke v. Hewitt* (1), has been since fully recognized \*and adopted in *Powell v. Lloyd* (2); and the case of *Weatherall v. Geering* (3) is no authority against the general principle, for the agreement there was for a lease which should contain a covenant not to assign. It may further be observed, that, even in cases where alienation without license from the landlord is expressly prohibited and guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law, under a commission of bankrupt, for example, or upon an execution for debt: *Doe dem. Mitchinson v. Carter* (4), *Lord Stanhope v. Skeggs* (5).

[ \*434 ]

I am therefore of opinion, that the VICE-CHANCELLOR's order must be discharged, and the injunction revived; but, having regard to the intention of the parties, I shall annex, as a condition to my order, that the plaintiff obtain the injunction on paying the defendant the sum due for rent from Michaelmas, 1831, to Michaelmas, 1832.

(1) 3 Ves. 253. See 8 R. R. 377, n.

(2) 31 R. R. 598 (2 Y. & Jer. 372).

(3) 8 R. R. 369 (12 Ves. 504).

(4) 4 R. R. 586 (8 T. R. 57, 300).

(5) 1 R. R. 447; 4 R. R. 589 (2 T. R. 134; 8 T. R. 59).

The cause was afterwards brought to a hearing at the Rolls, when the defendant abandoned the objection on the ground of the original tenant's insolvency; and a decree was made according to the prayer of the bill.—[*Note*.—See the next case.]

CROSBIE  
v.  
TOOKE.

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MORGAN *v.* RHODES (1).

(1 Myl. & Keen, 435—439; S. C. 1 Mont. & A. 214.)

Where a landlord agrees to grant a lease to A., his executors, administrators, and assigns, upon certain conditions, and A. assigns his interest in the contract to B., and then becomes bankrupt, B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso, that in case of the bankruptcy of A. the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A.'s estate.

1834.  
March 21, 27.

Lord  
BROUGHAM,  
L.C.

[ 435 ]

THE defendant William Rhodes, on the 23rd of February, 1822, entered into a contract to grant to Charles Auckland, his executors, administrators, and assigns, at a rent of 20*l.* a year, a lease for ninety-seven years of a certain parcel of land, upon which Auckland agreed to build six messuages. The building of these messuages was, with the rent reserved, the consideration given for the lease. Auckland's agreement (amongst other things), was to erect, build, and completely finish, fit for habitation, the six messuages on or before the 1st of March, 1823: and, in the event of Auckland duly performing his part of the contract, Rhodes, on his part, undertook to demise to Auckland, his executors, administrators, or assigns, by one or more lease or leases, the parcel of land in question, with the messuages to be erected thereon, for the term and at the rent before-mentioned, or at such apportioned rents as might be afterwards agreed. The contract further contained a stipulation that, in case of breach or non-performance of the agreement by Auckland, or if Auckland should become bankrupt or execute a general assignment of his effects for the benefit of his creditors, or if the intended erections and buildings should be abandoned or left in an unfinished state, it should be lawful for Rhodes to take possession of the premises

(1) See the preceding case.

MORGAN  
v.  
RHODES.

[ \*436 ]

and to sell the agreement with all benefit and advantage thereof, and the said parcel of ground, buildings, erections, and materials, for the residue of the term, and to receive the purchase-money ; and that, after executing all proper conveyances to purchasers, he should pay over to Auckland the overplus (if any) of the monies produced \*by such sale, after retaining thereout his necessary charges and expenses, and also all such sums of money and interest, not exceeding in the whole 400*l.*, as should be then due to him from Auckland. The whole of the conditions and stipulations already stated were contained in a printed form with the blanks filled up, being the form adopted with respect to all leases upon the Beauvoir estate, in which Rhodes had obtained a large interest. But, in addition to the printed contract, and immediately preceding the signature of the parties and the attestation of the witnesses, was inserted a written proviso, whereby Rhodes agreed to provide the bricks for building the six messuages at the usual prices, and to give credit for them until the granting of the leases, not exceeding three years ; and further to grant a lease of each house when covered in and certified by Auckland's surveyor to be so, upon payment of the money due upon such house.

In the month of October, 1822, Auckland sold his interest in the contract, as to three of the six messuages, to the plaintiff Mrs. Morgan for 600*l.*, and an improved ground rent, and 20*l.* of the purchase-money were immediately paid. In May, 1823, Auckland became bankrupt ; and Rhodes subsequently purchased from the assignees under his commission all Auckland's interest in the premises contracted to be demised. The plaintiff, by her bill (among other things), prayed that Rhodes might be decreed specifically to perform his agreement with Auckland, by executing to her, as Auckland's assignee, a lease of the three houses.

The VICE-CHANCELLOR dismissed the bill on the ground of Auckland's bankruptcy, and the plaintiff now appealed from his Honour's decision.

[ 437 ]

The *Solicitor-General* (Sir C. Pepys) and Mr. Jacob for the plaintiff.

*Mr. Knight and Mr. Ching* for the defendant.

MORGAN  
v.  
RHODES.

Upon the argument of the appeal, three questions were raised at the Bar: first, whether, upon the true construction of the contract, it was a condition precedent before the tenant had a right to demand a lease, that the whole of the six messuages should be completely finished, fit for habitation, by the 1st of March, 1823, or whether the effect of the concluding proviso was not to dispense with that condition and to entitle the tenant, at any time within three years, to leases of the houses separately, as each was successively covered in; secondly, whether, assuming the latter to be the sound construction, the contract was not, upon general principles, wholly determined and incapable of being enforced for the benefit of a person who claimed as assignee, by reason of the subsequent bankruptcy of the original contracting party; and, thirdly, if that point were decided in the negative, whether, having regard to the peculiar frame of this instrument, the clause which provided for the event of the tenant becoming a bankrupt or executing a general assignment of his property did not, under the circumstances, operate as a forfeiture of the contract, and release the landlord from his obligation to perform it. Upon the second point reliance was placed by the appellant on the decision of this Court in *Crosbie v. Tooke* (1). The argument of both parties on the other points consisted entirely of observations on the peculiar form and wording of the memorandum of agreement, and on the scope and purpose of its several provisions.

The LORD CHANCELLOR [after stating the case and the material parts of the agreement delivered the following judgment:]

March 27.

[ 438 ]

That the written proviso is a most material variation of the contract, as that would have stood upon the preceding printed portion of the instrument, there can be no doubt. For, first, it contemplates a granting of the lease, not when the houses are finished or before the 1st of March, 1823, which is twelve months from the date, but at any time within three years from that date; and, next, it obliges Rhodes to grant the leases as the houses

(1) P. 342 above.

MORGAN  
v.  
RHODES.

are roofed in, and not when the whole six are finished. The proviso not only puts an end to the finishing in twelve months as a condition precedent to the demise, if such would have been the sound construction upon the former part of the agreement, but it also destroys the entirety of the contract, by giving Auckland a right to have his lease of the houses severally, as they were covered in. Now the evidence in the cause is clear, that the three houses, for which a lease is prayed by this bill, were covered in and certified to be so.

The Court below proceeded chiefly, indeed almost entirely, on the ground that the bankruptcy of Auckland had determined his right to the lease. The case of *Crosbie v. Tooke* removes this ground; and of the point in that decision I entertain not the least doubt, and never did.

[ \*439 ] But it is said that there is a clause of forfeiture in this agreement. It is, however, not such a clause as, if inserted in the lease to be granted, would have worked a cesser of the term. On the contrary such an effect is carefully avoided. Rhodes is only, in that and the other cases provided for, to enter and take possession, and sell and dispose of the agreement and all benefit thereof, and \*the premises for the term agreed to be demised, subject to the rent, and to receive the purchase-money for the term or agreement, and pay over the residue to Auckland, his executors, administrators, or assigns, after deducting the expenses incurred by the proceeding. The bankruptcy, therefore, far from extinguishing the term or right to have a term demised, keeps alive the former, if the agreement shall have been executed, and the latter, if it remains still *in fieri*. It is needless to add any observations upon the fact, not unimportant, that Rhodes, by the purchase which he afterwards made from the assignees under C. Auckland's commission, is now, in truth, to be considered as standing in the shoes of Auckland himself; and that he allowed Mrs. Morgan to lay out her money on the premises after the supposed forfeiture, whether by the lapse of time before finishing the houses, or by the bankruptcy.

The decree of his Honour, dismissing the bill, must therefore be

*Reversed.*

## KING v. KING.

(1 Myl. &amp; Keen, 442—445.)

1833.

*April 18.**Rolls Court.*

LEACH, M.R.

[ 442 ]

Where a party had contracted to purchase, and had been eight years in possession of premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase-money and no rent; the Court, upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit.

THE plaintiff considering himself to be entitled to, and being in possession of one undivided third part of certain premises, to the other two undivided third parts of which the defendants were entitled, on the 30th of December, 1822, entered into an agreement in writing to sell his undivided third part to the defendants for the sum of 1,620*l.*, to be paid on the 25th of March then next, at which time the defendants were to be let into possession. The defendants were accordingly let into possession on the 25th of March, 1823, and on that day an abstract of the plaintiff's title was delivered to them.

To the title of the plaintiff, as it appeared upon this abstract, objections were taken, on the part of the defendants, which the plaintiff was unable to remove, and negotiations were then entered into between the plaintiff and the defendants with a view to arrange the terms for the acceptance by the latter of such title as the plaintiff was able to make; but these negotiations ultimately failed.

On the 15th of November, 1830, the defendants continuing in possession of the premises contracted for, and having neither paid any part of the purchase-money, nor accounted for any part of the rents and profits, upon the plea that they were ready to complete their purchase when the plaintiff could give them a good title, the plaintiff served the defendants with a written notice, which, after reciting the agreement, proceeded as follows: "I, John Edward King, do hereby give you \*and each of you notice that I hereby require you to abandon the said agreement, and to deliver the same up to me, and to permit me to enter into possession of the hereditaments and premises in the said agreement comprised, and to account to me for the rents and profits

[ \*443 ]

KING  
v.  
KING.

of the said hereditaments and premises received by you and each of you ; I, the said John Edward King, being ready and willing to permit you, and each of you, to abandon the said agreement, and to receive the said agreement into my possession, for the purpose of the same being cancelled ; and further take notice, unless you signify to me within fourteen days from the date of this notice your intention as to abandoning or not abandoning the said agreement, that I shall file a bill against you in his Majesty's High Court of Chancery, to compel you to abandon the said agreement, at the expiration of fourteen days from the date hereof."

The defendants having returned no answer to this notice, the plaintiff, on the 16th of December, 1830, filed the present bill, which prayed that the defendants might be decreed either to deliver up the agreement to be cancelled, or to accept such title as the plaintiff was able to make, and that an account might be directed against them for the rents and profits of the premises in question which they had received during the time they had been in possession.

The defendants, by their answer, admitted the facts alleged by the bill ; but stated that they could not set forth, whether the plaintiff could or could not make a good title ; and that, if he could make a good title, they were ready to perform their contract.

[ 444 ]

The cause was heard on the 28th of January, 1832, when, the defendants refusing to abandon the contract, the usual reference was made to the Master as to the title.

On the 12th of March, 1833, the Master made his report against the title, and upon the cause coming on to be heard on further directions, the questions made were first, whether the plaintiff was entitled to a decree that the contract should be delivered up to be cancelled ; and, secondly, whether the defendants ought not to pay the costs of the suit.

*Mr. Pemberton and Mr. Richards, for the plaintiff.*

*Mr. Barber, for the defendants, contended that the Court had no jurisdiction to direct an agreement to be delivered up to be cancelled, unless fraud or misrepresentation could be fixed*

upon the party against whom the decree was made. Here the fraud or misrepresentation, if any, was on the part of the plaintiff, who had entered into a contract which he was either unable or unwilling to perform.

KING  
v.  
KING.

#### THE MASTER OF THE ROLLS:

This is a very special case. The defendants, having been in receipt of the rents and profits of the premises under the contract for nearly eight years, and not having paid one shilling of the purchase-money, refuse either to abandon the contract or to take such title as the plaintiff can make. They did not think fit to answer the proposal made to them by the plaintiff to that effect in November, 1830; and they now state their reason to be, that they were at that time ready to perform their contract, provided the plaintiff would make to them a \*good and marketable title, although they well knew, from the examination of the abstract, and the negotiations which had taken place between them on the subject, that the plaintiff had it not in his power to give such title; thus retaining most unjustly from the plaintiff the possession of the estate which they had agreed to purchase, and the price which they had agreed to pay. Against this injustice the plaintiff had no remedy but to file the present bill; and, as the Court cannot permit the defendants to make so inequitable a use of the contract, the agreement must be delivered up to be cancelled. The defendants must account for the rents and profits of the premises which they have received and retained; and, their improper conduct having made this suit necessary, they must

[ \*445 ]

*Pay the costs.*

#### MILLIGAN v. MITCHELL.

(1 Myl. & Keen, 446—452.)

[THIS was an application for an interlocutory injunction in a cause which is reported on the hearing in 3 Myl. & Cr. 72. The report of this application is reserved to be dealt with when the report of the hearing is reached.—O. A. S.]

1833.  
April 18, 19,  
23.  
Lord  
BROUGHAM,  
L.C.

1832.

*June 7, 14.**Rolls Court.*

LEACH, M.R.

[ 465 ]

BAINES *v.* OTTEY (1).

(1 Myl. &amp; Keen, 465—470; S. C. 1 L. J. (N. S.) Ch. 210.)

A testatrix gave real and personal estate to trustees in trust for M. K. for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of M. K., and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representative of M. K. M. K. appointed only a part of the personal estate. The next of kin, and not the executors, were held to be entitled to the unappointed part of the personal estate.

SARAH JOHNSON, by her will, dated the 30th day of October, 1798, gave, devised, and bequeathed all and every her messuages, lands, tenements, and hereditaments, of what nature, kind, or quality soever, situate in Speldhurst, or elsewhere in the county of Kent, together with the sum of 5,000*l.*, and all her furniture in the house there, then inhabited by Mrs. Byng, and also all her furniture in the house then inhabited by Lady Monson, and which last-mentioned house she had then already given to, or to the use of, her niece Dame Mary Knightley, and also all her diamonds, jewels, trinkets, and watches, other than such as were thereafter bequeathed, and one third part of her plate, linen, and china, and the pictures of her late brother the Bishop of Worcester and Lord Mansfield, and any other of her pictures which her said niece the said Dame Mary Knightley should choose to have, to George Knight, George Brooks, and their heirs, executors, administrators, and assigns, upon trust to hold to them the said George Knight and George Brooks, their heirs, executors, administrators, and assigns, to such uses, intents, or purposes, as her niece the said Dame Mary Knightley should, by any deed or by her last will and testament duly executed, notwithstanding her then present or any future coverture, direct or appoint; and until such direction or appointment should be made, upon trust to permit and suffer the same to be enjoyed, or the rents and profits thereof to be received, by the said Mary Knightley and her assigns for her own sole and separate use and benefit absolutely, independent of \*the control, debts, engagements, or interference of her then present or any future husband; and, in

[ \*466 ]

(1) *Stockdale v. Nicholson* (1867) L. R. 4 Eq. 359; 36 L. J. Ch. 793; 16 L. T. 767.

BAINES  
v.  
OTTEY.

default of such direction or appointment, she ordered and directed that the said George Knight and George Brooks, and the survivor of them, and the heirs, executors, and administrators of such survivor should, immediately after the decease of the said Mary Knightley, convey and assign the whole of her said real estates, or such part thereof respecting which no such direction or appointment should have been made, to such person or persons as would be the heir-at-law of the real estates of the said Mary Knightley, and transfer and assign the whole of the said 5,000*l.*, and other the personal estate so bequeathed to them in trust as aforesaid, or such part thereof respecting which no such direction or appointment should have been made, to or amongst such person or persons as would be the personal representative of the said Mary Knightley.

The testatrix died in the year 1795, without having altered or revoked her will. The sum of 5,000*l.*, mentioned in the will, was invested in the purchase of 5,305*l.* 4 per cent., afterwards converted into 3½ per cent., Bank Annuities; and the dividends were received by Lady Knightley during her life.

Lady Knightley died in September, 1830, having made a will, whereby she gave several pecuniary legacies; and, as to all the rest and residue of her goods, chattels, rights, credits, monies, securities for money, personal estate and effects whatsoever and wheresoever, she gave and bequeathed one moiety, or half part thereof, to her nephew James Johnson Baines of Burwell; and she gave and bequeathed the other moiety thereof to and amongst all and every the children of her late nephew James Johnson Baines of Cainham, to be equally divided \*among them share and share alike. The testatrix appointed the defendants, Philip Ottey and Charles Warren, executors thereof, by whom her will was duly proved.

[ \*467 ]

Lady Knightley did not, in her will, notice the 5,305*l.* 3½ per cent. Bank Annuities, nor the power of appointment given to her by the will of Sarah Johnson; but by a deed, dated the 1st of February, 1811, she had, by virtue of the power vested in her by the will of Sarah Johnson, charged the sum of 5,305*l.* stock with the payment of 873*l.* 7*s.* 3*d.* and lawful interest thereon to George Brooks, and such sum with interest remained unpaid at her death.

BAINES  
v.  
OTTEY.

The present bill was filed by the next of kin of Lady Knightley against the executors of her will, and against the trustees in whose names the sum of stock was then standing; and the bill prayed that it might be declared that the sum of stock, subject to the appointment in favour of George Brooks, might be declared to belong to the plaintiffs.

The defendants, the executors, submitted by their answer that the sum of 5,905*l.* stock was disposed of by the will of Lady Knightley as part of her general personal estate; and that, if not disposed of, such sum belonged to them under the will of Sarah Johnson, as the personal representatives of Lady Knightley.

[ \*468 ] *Mr. Bickersteth* and *Mr. Hayter*, for the plaintiffs, cited and commented upon the following cases: *Bridge v. Abbott* (1), *Long v. Blackall* (2), *Jennings v. Gallimore* (3), \**Sanders v. Franks* (4), *Price v. Strange* (5), *Saberton v. Skeels* (6), [and other cases.]

*Mr. Pemberton* and *Mr. J. Parker*, for the executors of Lady Knightley, insisted that the words "personal representatives" must be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will, and there was nothing in the will to control the ordinary meaning of those words. \* \* \*

[ 469 ] *Mr. Teed*, for the trustees.

*Mr. Bickersteth*, in reply.

June 14. THE MASTER OF THE ROLLS:

The case of *Saberton v. Skeels* was decided on the ground that the words "personal representatives" were to be considered as words of limitation, and synonymous with executors and administrators, and that the wife took, therefore, an absolute interest. In this case I am of opinion, that, by the words "personal representatives," the testatrix intended the next of kin of Lady Knightley. With respect to the real estate devised in the same

(1) 3 Br. C. C. 224.

(2) 4 R. R. 73 (3 Ves. 486).

(3) 3 R. R. 77 (3 Ves. 146).

(4) 17 R. R. 202 (2 Madd. 147).

(5) 22 R. R. 266 (6 Madd. 159).

(6) 32 R. R. 284 (1 Russ. & M. 587).

clause, she has expressed her intention that the person should take, who would have succeeded to it, if it had been real estate of Lady Knightley, and not disposed of \*by her, and it is to be inferred that she had a like intention with respect to the personal estate: the next of kin of Lady Knightley are, therefore, entitled to it. It has been properly observed, that the words “to or amongst such person or persons as would be the personal representatives of Lady Knightley” are not applicable to executors or administrators.

BAINES  
v.  
OTTEY.  
[ \*470 ]

## GUTTERIDGE v. STILWELL (1).

(1 Myl. & Keen, 486—487.)

Where there was a fund in Court standing to the separate account of a married woman, whose husband survived her, and died before administering to her estate, the fund was ordered to be paid to the wife's legal personal representative, although such representative had not also obtained administration to the husband's estate.

1833.  
May 24, 31.  
Lord  
BROUGHAM,  
L.C.  
[ 486 ]

In this cause a sum of 155*l.* had been carried to the separate account of a married woman of the name of Wyatt. Mrs. Wyatt died in the lifetime of her husband, who himself died before administering to his wife's estate: and a petition was then presented by their son, who had obtained letters of administration of his mother's estate only, praying that the sum of money standing to her separate account might be ordered to be paid to him.

The MASTER OF THE ROLLS refused the application, on the ground that the petitioner, in order to complete his title to the sum in question, ought to have taken out administration to the estate of the husband as well as to that of the wife. The application was now renewed before the Lord Chancellor.

Mr. Barber, in support of the petition, submitted that in a case of this kind the expense of a second administration was unnecessary, at least for the purposes of the present application. The money, not having been reduced into possession by the husband at his death, continued to form part of the wife's

(1) Questioned, *Partington v. Att.-Gen.* (1869) L. R. 4 H. L. 100.

GUTTERIDGE v. STILWELL. estate, and the petitioner, in the character of her personal representative, was now entitled to receive it, taking it of course subject to every equitable demand upon it, and being liable to account for its due administration. All that this Court had to look to was that the payment was made to the proper legal hand; leaving it to parties, who might have claims upon the fund, to assert their rights in the regular way by action or suit, in the event (which, \*where no such case was formally brought to its notice, the Court would never presume), of the legal representative attempting to defeat or disappoint those rights. The principle on which this application was refused, if followed out to its consequences, would involve the Court in the necessity, at once inconvenient and dangerous, of incidentally administering the assets of a great number of deceased persons in one and the same suit, wherever any portion of the estates of such persons happened to have found its way into Court.

[ \*487 ]

May 31.

The LORD CHANCELLOR took time to consider the point; and finally, several days afterwards, made the order as prayed by the petition, observing that he came to this determination after consulting the learned Judges in the Ecclesiastical Courts, and that he considered it impossible for the Court to look beyond the admitted legal personal representative.

1883.  
May 7, 8, 22.

[ 488 ]

## DOUGLAS v. RUSSELL.

(1 Myl. &amp; Keen, 488.)

An assignment of future freight by the owners of a ship is good.  
Affirmed on appeal.

[SEE the report of this case in the Court below taken from  
4 Simons, 524; 33 R. R. 135.]

LOUCH *v.* PETERS.

(1 Myl. &amp; Keen, 489—499; S. C. 3 L. J. (N. S.) Ch. 167.)

A testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half yearly, out of real estate, clear of all taxes and outgoings. The annuitant takes it clear of the legacy duty (1).

THE testatrix, Elizabeth Eason, by her will gave and devised to the plaintiff, during his natural life, one annuity or clear yearly sum of 500*l.* to be paid and payable to him by and out of the farm called Bridge Farm, and the tenements and lands at Little Lopen and Drayton, and the other tenements, lands, tithes, and hereditaments in the parish of South Petherton, which were devised by her brother's will; and she directed that the said annuity should be paid half yearly, clear of all taxes and outgoings; the first payment thereof to be made in six calendar months next after her decease, and that the plaintiff should have the same remedies for recovery of the said annuity from time to time by distress on the premises charged therewith, and by impounding and sale, as in case of rent in arrear are provided by law.

One of the questions in the cause was, whether the annuity thus given to the plaintiff was to be paid to him free of legacy duty.

The defendant was, under the will of the testatrix, executor, residuary legatee, and devisee for life of the estate charged with the annuity. The legacy duty charged on the annuity in question amounted to 563*l.* 4*s.* payable in four yearly instalments, two of which instalments had been paid by the defendant at the date of the answer, and a sufficient sum was afterwards paid by him into Court to satisfy the plaintiff's claims, if established, as well in respect of exoneration from legacy duty as in respect of other matters pending in the cause.

*Mr. Bickersteth* and *Mr. Jacob*, for the plaintiff.

*Mr. Pemberton* and *Mr. Barber*, *contrà*.

For the plaintiff it was argued, that the words "clear of all taxes and outgoings" manifested the intention of the testatrix

(1) See *ante*, p. 244.

1833.

April 18.

*Rolls Court.*

LEACH, M.R.

1834.

April 30.

May 2.

Lord

BROUGHAM,

L.C.

[ 489 ]

[ 490 ]

LOUCH  
v.  
PETERS.

to exonerate the annuity as well from legacy duty as from all other charges; and that this construction was supported by all the authorities: *Barksdale v. Gilliat* (1), *Smith v. Anderson* (2), *Courtoy v. Vincent* (3), &c.

On the other side it was insisted, that the legacy duty was a charge upon the legatee or annuitant, and that where such expressions as those used by the testatrix could be referred to taxes or outgoings properly applicable to the subject-matter of the gift, the legatee or annuitant remained liable to the legacy duty. \* \* \*

[ 491 ]

## THE MASTER OF THE ROLLS :

The amount of the legacy duty is said to be about 560*l.*, of which sum the fourth is payable in each of the first four years, and if this duty is to be paid by the annuitant, he would in each of these years receive from this gift not the clear yearly sum of 500*l.*, but only 360*l.* a year. The intention of the testatrix is too plainly expressed to admit of this construction. An annuity issuing out of real estate is by law subject to a proportion of the land tax, and it is argued that the intention of the testatrix will be satisfied by the payment of the annuity clear of land tax. I cannot think that the testatrix, in directing the annuity to be paid clear of all taxes and outgoings, had in view this proportion of the land tax. She meant to provide a clear annual sum of 500*l.* free from all deductions whatsoever.

The defendant appealed from this decision.

1884.  
April 30.

The *Solicitor-General* (*Sir C. Pepys*) and *Mr. Barber*, for the appellant, [in addition to the cases cited below, referred to *Brewster v. Kitchin* (4) and *Noel v. Lord Henley* (5).]

*Mr. Rolfe* and *Mr. Jacob*, *contrà*. \* \* \*

[ 495 ]

The *Solicitor-General*, in reply.

May 2.

The LORD CHANCELLOR (after stating the case) [affirmed the

(1) 18 R. R. 139 (1 Swanst. 562).

(4) 1 Ld. Ray. 317.

(2) 28 R. R. 122 (4 Russ. 352).

(5) 26 R. R. 660 (7 Price, 241 ; 12

(3) 24 R. R. 94 (T. & R. 433).

Price, 213).

decree of the MASTER OF THE ROLLS with costs, saying that he had no doubt at all on the question.

LOUGH  
C.  
PETERS.

In the course of his judgment, referring to *Smith v. Anderson*(1), he said:] But I must observe that, on this case of *Smith v. Anderson*, agreeing entirely in the decision, I cannot go along with the commentary of the learned Judge upon Lord ELDON's judgment in *Barksdale v. Gilliat*; for you will in vain search through the case as reported in 1 Swanston (and it is to this book that his Honour refers) to find a word pointing towards the proposition that the words "without deduction" would not clear a legacy from the duty, if there were, from the nature of the property on which it was charged, other outgoings that might be intended. \* \* \*

[ 499 ]

### BENBOW v. TOWNSEND.

(1 Myl. & Keen, 506—510; S. C. 2 L. J. Ch. (N. S.) 215.)

1833.  
June 10, 11.  
July 8.

Where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, this being personal estate is not within the clause in the Statute of Frauds relating to resulting trusts, or the doctrine of resulting trusts under that statute; but the property after the death of A. will belong to B. by force of the parol declaration.

Rolls Court.  
LEACH, M.R.  
[ 506 ]

A resulting trust arising upon a purchase in the name of another may be rebutted as to part of the interest purchased by a parol declaration of the real purchaser in favour of the nominal purchaser.

THE testator, William Townsend, on the 14th of April, 1881, lent a sum of 2,000*l.* to the trustees of Tottenham Court Chapel, and by a deed of covenant of that date the trustees covenanted to surrender the chapel, which was copyhold held of the lord of the manor of Tottenham, to the use of Job Townsend, the brother of the testator, and his heirs, (Job Townsend being therein stated to have advanced the 2,000*l.*) subject to the usual proviso for redemption; and at a special court baron held on the same day, the chapel was accordingly surrendered to the use of the said Job Townsend and his heirs.

The testator did not, at the time of advancing the loan, or at any time afterwards, communicate the transaction to Job

(1) 28 R. R. 122.

BENBOW  
v.  
TOWNSEND.

Townsend. He made an entry in his ledger in these words:  
“Tottenham Court Chapel. Lent on mortgage at 5 per cent.,  
April 14th, 1881, 2,000*l*.”

[ \*507 ]

At the time of the loan, the testator gave directions to the trustee who treated with him for it, that the security should be made in the name of his brother Job Townsend, as he intended the mortgage to be for his benefit, and that it would then be his. The same trustee, in November, 1881, paid the testator 50*l*. for half a year's interest on the 2,000*l*., which became due in the October preceding, and the testator then said he should receive the interest, but that the principal money was \*to be his brother Job's, and he made another entry in his ledger as follows: “Received from Mr. Prior, interest to 14th of October, 50*l*.”

The testator afterwards received two further sums of 50*l*. each for the subsequent interest, which became due in his lifetime.

He died on the 10th of March, 1883, having made a will and codicil, in which there was no mention of the mortgage.

The bill was filed against Job Townsend by the executor and residuary legatees under the will of Wm. Townsend, and the question in the cause was, whether, under the circumstances, Job Townsend was entitled to the principal sum of 2,000*l*., and all interest thereon which accrued due after the testator's death, or whether the 2,000*l*. belonged to the estate of the testator.

*Mr. Pemberton and Mr. Ching, for the plaintiffs:*

[ \*508 ]

\* \* As the money advanced to the trustees of the chapel was the money of the testator, there was a resulting trust for his benefit; and though that presumption may undoubtedly be repelled by parol evidence, it must be such parol evidence as will support, and be consistent with the legal title. If evidence inconsistent with the legal effect of the deed were admissible for the purpose of repelling the presumption of a resulting trust, an estate in land might be created by parol. The effect of the exception in the Statute of Frauds, in respect of trusts resulting by implication of law, is, in the present case, to give the absolute interest in the principal and interest of this sum of 2,000*l*., not to the defendant in whose name the security was taken, but to the individual by whom the money was advanced.

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Parol evidence to repel this implication must shew that the equitable corresponded with the legal title; here the equitable title, which the parol evidence is adduced to support, is not commensurate with the legal title, and is consequently inconsistent with the written instrument. \* \* \*

*Mr. Bickersteth and Mr. Parker, for the defendant :*

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The inference from the legal instrument, *primâ facie*, is, that Job Townsend was the person who lent the money to the trustees of the chapel; but if that inference be rebutted by extrinsic evidence, shewing that the money was William Townsend's, it would surely be most unjust to stop there, and refuse to let in further parol evidence to shew that William intended his brother to have the benefit of it. \* \* It was perfectly competent to William Townsend to reserve a portion of the equitable interest in the mortgage to himself, giving the remainder of it, as well as the legal title, to his brother : *Maddison v. Andrew*(1). \* \* \*

*Mr. Pemberton, in reply.*

THE MASTER OF THE ROLLS :

July 8.

[ 510 ]

In the case of *Lloyd v. Spillet*(2), and also in the case of *Lane v. Dighton*(3), it is expressly decided that a resulting trust may be rebutted as to part of the land comprised in a deed, and prevail as to the remainder; and if it can be rebutted as to part of the land, there can be no reason why it may not equally be rebutted as to part of the interest in the land. But in this case, the trust being of personal estate, the case is not within the Statute of Frauds, or the doctrine of resulting trusts under that statute; but the property will belong to the brother after the testator's death, by force of the testator's declaration that the 2,000*l.* should, after his own death, be the property of his brother Job.

(1) 1 Ves. sen. 58.

(3) Amb. 409.

(2) 2 Atk. 148.

1834.  
March 18, 27.

Lord  
BROUGHAM,  
L.C.  
[ 511 ]

# CRABB v. CRABB.

(1 Myl. & Keen, 511—519; S. C. 3 L. J. (N. S.) Ch. 181.)

A father transferred a sum of stock from his own name into the joint names of his son and of a person whom both father and son employed as their banker to receive their dividends; and he told the banker to carry the dividends of the sum so transferred, as the same were received, to the son's account. Under this direction the dividends were enjoyed by the son as long as the father lived: Held, on the father's death, first, that the son was entitled to the stock absolutely; secondly, that a codicil to the father's will, executed two years after the transfer, could not be read to qualify or explain the effect of the transaction; and, thirdly, that the language of that codicil, with respect to the stock, was too vague and obscure to put the son to his election between the stock transferred, and the benefits given him by the will.

JAMES CRABB, by his will, made in the year 1802, bequeathed his property, which was considerable, to his son, the plaintiff, James George Crabb, and his three daughters, in manner therein mentioned. In the month of February, 1824, he transferred the sum of 10,000*l.* 8 per cent. Consols, which formed part of a larger sum of like stock then standing in his own name, into the joint names of James George Crabb and of D. R. Remington, one of the partners in the banking house of Remington, Stephenson, & Co., who then were, and from thence till the testator's death, continued to be, the bankers as well of the testator as of James George Crabb his son. In the month of July in the same year, the testator had an interview with Mr. Remington, and verbally directed that the half-yearly dividends upon the said 10,000*l.*, which dividends had been then recently received and carried to the credit of his (the testator's) account with Messrs. Remington & Co., should be transferred to the account of his son James George Crabb, and that the future dividends, as they accrued due, should be, in like manner, placed to the credit of the same account. This was accordingly done; and, under the authority of the verbal direction, the dividends were regularly received and enjoyed by James George Crabb as his own during the whole of his father's life: but no further intimation of his purpose \*in transferring the stock was ever made by Mr. Crabb the father, and no declaration of trust of the stock itself was ever executed. On the 19th of July, 1826, the testator executed two codicils to

[ \*512 ]

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his will; by the first of which, after giving certain pecuniary legacies to his daughters, he bequeathed the residue of his fortune to his son James George Crabb for his life, with remainder to his children as therein mentioned; and he appointed his son James George Crabb, D. R. Remington, and two other persons, his executors. The second codicil began in these words, "I have appointed James George Crabb, D. R. Remington, &c. my executors to my last will, in a codicil made this day, viz. that I have made in 3 per cent. Consols an account in the name of the said James George Crabb and D. R. Remington, that is, for 10,000*l.* Consols; I also desire that my executors sell my East India as well as my Bank stock, to be placed in the Consols for and on account of my son James George Crabb and family," &c.

At the time when these codicils were executed, the plaintiff, James George Crabb, was a widower upwards of forty years of age. The testator died in the year 1828. At the hearing of the cause on further directions, the MASTER OF THE ROLLS, among other things, determined that the 10,000*l.* 3 per cent. Consols transferred into the joint names of the plaintiff and D. R. Remington passed under the second codicil along with the East India and Bank stock, and an appeal was now brought from that decision.

The principal questions argued on the appeal were, first, whether the transfer of the 10,000*l.* stock into the joint names of the plaintiff and Remington, coupled with the direction to the latter to place the accruing dividends to the credit of the plaintiff, operated as an advancement \*to the testator's son; and, secondly, if it did, whether the second codicil amounted to a disposition of the stock, so as to raise a case of election against the son.

[ \*513 ]

The *Solicitor-General*, Mr. Wray, and Mr. O. Anderdon, in support of the appeal, contended, that the effect of the transfer in February, 1824, was to convey to the plaintiff an absolute and immediate interest in the stock: \* \* *Murless v. Franklin*(1). \* \* The addition of the banker's name as a

(1) 18 R. R. 3 (1 Swanst. 13).

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trustee was probably made with a view to enable him to receive the dividends, and possibly also to operate as some check against the plaintiff's precipitately or improvidently disposing of the fund.

[ \*514 ] It might, perhaps, be urged, that the insertion of Mr. Remington's name in the Bank books, jointly with that of \*the plaintiff, rendered the former a trustee for Mr. Crabb the elder. \* \* *Lamplugh v. Lamplugh*(1), was a distinct authority to shew, that in a conveyance without valuable consideration by a father to his son, the addition of a stranger's name to that of the son did not deprive the transaction of its character as advancement, or operate as a reservation of any right of property in the father. \* \* \*

*Mr. Knight and Mr. Kindersley*, for the respondents :

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\* \* Mr. Remington's conduct in at first carrying the dividends to the credit of the testator's account plainly shewed how he understood the matter ; and the subsequent direction given by Mr. Crabb the elder to place them in future to the credit of his son amounted to no more than an authority or mandate under which, till his father should recall it, the plaintiff became entitled to receive and enjoy the profits of the stock. The plaintiff's interest in the dividends, therefore, was a mere interest at will, being entirely dependent on the pleasure of his father, who might at any moment defeat it by signifying his wishes to that effect. If the son had died in the lifetime of Mr. Remington, could it then have been contended that the representatives of the son might claim the capital of the fund? \* \* \*

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The notion that the plaintiff and Mr. Remington were joint tenants holding in different characters, the one as beneficial owner, and the other merely as trustee, was contrary to principle and probability, and was quite unsupported by authority : *Stileman v. Ashdown*(2). \* \* *Lamplugh v. Lamplugh* was very different in its circumstances. The conveyance was there made to a nephew jointly with the infant son ; and great stress was laid by the LORD CHANCELLOR on the fact of that son being a minor,

(1) 1 P. Wms. 111.

(2) 2 Atk. 477.

and therefore unfit to be a trustee; his Lordship holding that the protection which the infant might derive from having another person associated with him in the legal ownership of the estate, was a probable and prudential reason why the conveyance was made in so singular a form. \* \* \*

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THE LORD CHANCELLOR:

March 27.

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With respect to the sum of 10,000*l.* Consols, transferred by the testator into the names of the plaintiff, James George Crabb, his son, and D. R. Remington, two questions are raised; first, was the transfer a gift or advancement to his son; and, secondly, if it was, has the donor so dealt with the subject-matter of it by his will as to raise a case of election?

Without departing from the authorities, it is impossible to doubt that the transfer was a gift or advancement to the plaintiff. It is true that in *Stileman v. Ashdown*(1), Lord HARDWICKE appears to complain of the Court having gone too far in supporting advancement. But he determines nothing against the doctrines established, and indeed he professes to be bound by the rule; and in *Taylor v. Taylor*(2), decided a few years before, where a father had purchased land in his son's name, and taken possession himself, and continued to hold it and receive the rents and profits till his death, his Lordship decreed that the purchase was a trust for the son. In *Chapman v. Gibson*(3), Lord ALVANLEY comments on this case of *Taylor v. Taylor*, respecting which he had consulted the Registrar's book. In *Finch v. Finch*(4), where much consideration was given to the question, no traces can be discovered of any disposition in the Court to break in upon the principle; and Lord Chief Baron \*EYRE, in a case cited by *Mr. Watkins*(5), seems to doubt if it had been extended far enough. If, however, a purchase by the father, in the joint names of father and son, with the possession retained by the father, makes the transaction a gift to the son, surely this case of a transfer to the son and a stranger, though that stranger be the father's banker, cannot be less strong in

[ \*518 ]

(1) 2 Atk. 477.

(4) 10 R. R. 12 (15 Ves. 43).

(2) 1 Atk. 386.

(5) *Dyer v. Dyer*, 2 R. R. 14 (2 Cox,

(3) 3 Br. C. C. 229.

92).

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favour of advancement. If Mr. Remington had been only the father's banker, and not the son's, that circumstance would not be so strong to rebut or displace the ruling presumption of intention to give, as where the purchase was in the name, not of the father's banker, but of the father himself. It is said, indeed, that Mr. Remington was the son's banker as well as the father's, but there is no occasion to rest on that argument, for the reason I have assigned. Then *Lamplugh v. Lamplugh* (1) gives additional authority to the proposition. That was the case of a purchase in the name of the son and a nephew, the father taking the profits during his life; and the Court there held the purchase to be a trust for the son. Nor ought it, in the present case, to be laid out of view, that when the banker applied to the testator for instructions, the latter immediately told him to carry the dividends to his son's account. For these reasons, I am of opinion that the Consols were a gift or advancement to the son.

[ \*519 ]

I am further of opinion, that no reliance can be placed upon the reference made in the codicil, either as explaining the transfer, and shewing it to have been not a gift, but a trust for the father himself, or as raising a case of election. As explaining or qualifying the gift previously made, it clearly could have no such operation, \*even if its meaning were much plainer than any one can pretend to consider it. If the transfer is not ambiguous, but a clear and unequivocal act, as I must take it to be upon the authorities, for explanation there is plainly no place; although, indeed, when we look at it, anything less clear than this supposed explanation can scarcely be conceived. By itself it is hardly in any way sensible. At most it may be regarded as barely intelligible, or rather as capable of being made so by insertions and alterations. If, then, it cannot be admitted to explain, still less can it be allowed to qualify the operation of the previous act. The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto*, can ever be allowed to alter what had been already done.

Is there then, lastly, room for election? This depends upon whether or not the codicil assumes to give away from the son

(1) 1 P. Wms. 111.

what he had obtained by the transfer; and the argument, of course, proceeds upon the supposition, that the former reasoning had failed, and that the transfer effectually conveyed the Consols to the son. Now, in the very unintelligible sentence with which the codicil commences, there is nothing in the least inconsistent with an acknowledgment that the stock was the property of the son, and was so to remain. Even a construction which would vest the stock in the plaintiff and Mr. Remington, in their capacity of executors, would not, of necessity, exclude this supposition; since they might still be intended to hold it only as trustees for the beneficial owner. At all events, the expressions are of much too doubtful and obscure a nature to raise a case of election.

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### KILPIN *v.* KILPIN.

### KILPIN *v.* LAMB.

(1 Myl. & Keen, 520—543.)

1833.  
Mar. 6, 7, 21.

*Rolls Court.*  
LEACH, M.R.

1834.  
April 11, 12,  
19.

Lord  
BROUGHAM,  
L.C.

[ 520 ]

A person transferred 8,000*l.* 3 per cent. Consols and 4,500*l.* South Sea stock into the names of his illegitimate daughter and her husband, and their two eldest children, and by parol declarations, confirmed by an entry in a memorandum book, declared the investment to be for the benefit of all his daughter's children who should attain twenty-one. He afterwards transferred 900*l.* Long Annuities into his own name, jointly with the names of his illegitimate daughter and her two eldest children, and made a parol declaration that he did not intend to part with the control over this stock, and he disposed of it by a codicil to his will: Held, after the death of the daughter and her husband, and her two eldest children under twenty-one, that two surviving children, who had attained twenty-one, were entitled to the Consols and South Sea stock, and that the Long Annuities passed by the testator's codicil.

In this case two bills were filed by William Hopkins Kilpin and Charles Kilpin, the surviving children of Ann Kilpin, against their mother and other parties. The first bill was filed for the purpose of having it declared that Mrs. Kilpin, the mother, was a trustee for their benefit as to the sums of 8,000*l.* 3 per cent. Consolidated Bank Annuities, and 4,500*l.* South Sea Annuities, standing in her name. The second bill was filed for the purpose of having it declared that Mrs. Kilpin, the mother, was a trustee for the plaintiffs, in respect of a sum of 900*l.* Long Annuities also standing in her name, and to which

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the plaintiffs claimed to be entitled under a codicil to the will of James Widmore.

Mrs. Kilpin, the mother, died pending the suits, having made a will, by which she appointed Edwin Jackson and George Lamb her executors, and bequeathed to Jackson, to whom she was under an engagement of marriage, the three sums of stock which were the subject of the two suits. Lamb alone proved her will, and both suits were revived against him. As much of the evidence taken in the two suits applied equally to both of them, it was agreed that the two causes should be heard together.

[ \*521 ]

Mrs. Kilpin was the illegitimate daughter of the testator, James Widmore, who had no other child; and, in \*the year 1802, she intermarried with William Hopkins Kilpin the elder, the father of the plaintiffs. Upon that marriage the testator gave her as a portion a sum of 9,800*l.* 3 per cent. Consols, which, by her marriage settlement, was vested in trustees to the use of the intended husband and wife successively for life, with remainder to the children of the marriage.

In the month of November, 1817, there were four children of the marriage; namely, James Widmore Kilpin, Ann Kilpin the younger, and the two plaintiffs William Hopkins Kilpin and Charles Kilpin; and in that month the testator James Widmore transferred the two sums of 8,000*l.* 3 per cent. Consols, and 4,500*l.* South Sea Annuities, which were the subject of the first suit, into the names of Mr. and Mrs. Kilpin and their two eldest children, Ann Kilpin, and James Widmore Kilpin called in the transfer books James Kilpin, and he made a contemporaneous entry in a journal or memorandum book as follows: "November, 1817, transferred to Mr. Kilpin, Mrs. Kilpin, Miss Kilpin, and James Kilpin 8,000*l.* 3 per cent. Consols, and 4,500*l.* South Sea stock, for the use and benefit of the family, *omnibus inclusis.*"

On the 25th of August, 1820, the testator James Widmore transferred the sum of 900*l.* Long Annuities, which was the subject of the second suit, into the joint names of himself, Mr. and Mrs. Kilpin, and their son James Widmore Kilpin, who was in this transfer also called James Kilpin.

Ann Kilpin, the daughter, died on the 2nd of March, 1821, under the age of twenty-one. Mr. Kilpin, the husband, died

in the month of June, 1823. The son James Widmore Kilpin survived his father, but died in the month of June, 1824, under the age of twenty-one; and the testator James Widmore died in the month of \*October, 1825. The first bill was filed in the month of February, 1825, in the lifetime of James Widmore, who was one of the defendants to it, and the second bill in the month of November, 1825. Mrs. Kilpin, the mother, by her answer to the first bill, claimed to be entitled by survivorship, as well beneficially as legally, to the two sums of 8,000*l.* 3 per cent. Consols, and 4,500*l.* South Sea Annuities; and by her answer to the second bill, she admitted that James Widmore did not declare, or bind himself to any trusts as to the 900*l.* Long Annuities; and she submitted that the transfer thereof into the names of herself, her husband, and her son, was an advancement for their joint benefit, and that she was entitled to the same by survivorship. Mrs. Kilpin died in the month of May, 1828.

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[ \*522 ]

The testator James Widmore made his will on the 18th of January, 1821, and thereby devised considerable real estate to James Widmore Kilpin, the son, and gave his residuary personal estate equally between such of the four children of Mrs. Kilpin as should attain the age of twenty-one, with a direction to his trustees to apply any part of the expectant shares of the children to their maintenance and education during their minorities, without inquiring whether the parents were or were not of ability to maintain them.

The testator made a codicil to his will on the 26th day of July, 1825, in the following words: "I give 900*l.* a year, Long Annuity, now standing in my name, and the name of Ann Kilpin, as survivors in a joint account with William Hopkins Kilpin, deceased, and James Widmore Kilpin, deceased, therein called James Kilpin, to my executors, in trust for my grandchildren William Hopkins Kilpin, and Charles Kilpin, equally share and share alike, to vest at the age of twenty-one years; and in case either shall die under that age, I give the whole to such \*survivor; which said stock I placed in the names before mentioned for the benefit of my grandchildren, and for them only, as I named the parents merely as trustees, subject to any

[ \*523 ]

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directions I might afterwards give by will concerning the same ; and I desire my executors to permit the dividends to accumulate until my said grandchildren attain twenty-one years as aforesaid, and to lay out the same on Government or real security for that purpose, to the best advantage, in the mean time ; and I desire my executors to take all necessary steps for obtaining possession of the said stock. Witness my hand, the 26th day of July, 1825." \* \* \*

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Much evidence was read, which did not appear to the Court to be material ; on the part of the plaintiffs, the following deposition of Henry Beaumont Coles, who was the testator's attorney, was strongly relied upon :

[ \*525 ]

The deponent saith, that he was upon terms of intimacy and friendship with James Widmore at the time of his death, and had been so, more particularly, for \*the last six or seven years prior to his decease ; that he was well acquainted with the deceased William Hopkins Kilpin and Ann and his wife, and was on terms of intimacy and friendship with them from the year 1818, or 1819, down to the time of their respective deaths, and believes that Ann Kilpin, deceased, was the natural or reputed child of the said James Widmore, having heard the said James Widmore say, that Ann Kilpin was such natural or reputed child ; and that the deceased William Hopkins Kilpin had, by the said Ann his wife, four children living in the month of November, 1817, namely, Ann Kilpin, James Widmore Kilpin, and the plaintiffs William Hopkins Kilpin and Charles James Kilpin ; and saith that two of the said children, namely, Ann Kilpin and James Widmore Kilpin, are now deceased, and that Ann Kilpin died in the month of March, 1821, and was then at the age of sixteen or seventeen years, as deponent believes, and that James Widmore Kilpin died, as deponent believes, in the month of June, 1824, and that he was then of the age of between nineteen and twenty years ; and that conversations did frequently take place between deponent and the said James Widmore deceased, from the time deponent became professionally concerned for the said James Widmore in the year 1815 up to the time of his death, with respect to the children of the deceased William Hopkins Kilpin by Ann Kilpin

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his wife; and the said James Widmore expressed great anxiety for the welfare of the said children in the world, and some short time prior to the month of October, 1817, told the deponent, in conversation, that he, James Widmore, contemplated transferring certain stocks or funds, equal to about 10,000*l.*, into the names of the said children, jointly with those of their parents; and he afterwards told the deponent that the stocks which he contemplated transferring consisted of 8,000*l.* 3 per cent. Consolidated Bank Annuities, and \*4,500*l.* South Sea stock, and he did, on the first of the said occasions, and several times afterwards, tell deponent that he meant to give the said Bank Annuities and stock to the said children absolutely; and some time in October, 1817, the said James Widmore called upon deponent, and said he brought with him powers of attorney to effect the said transfers, and he did, on that occasion, execute two several powers of attorney for the purpose aforesaid; and, as deponent best recollects and believes, the same were executed in the presence of deponent, and he, deponent, with one of his then clerks, attested such execution thereof; and at the time when the said James Widmore executed the same, or just afterwards, the said James Widmore said, "I have now given these children as good as 10,000*l.*," and he added as follows, "Their father's name being in the account will enable him to receive the dividends for their benefit, and he can pay their school bills with it. It will save the necessity of his applying to me from time to time to pay their school bills." And the deponent further saith, that shortly afterwards, upon the occasion of deponent seeing the said James Widmore at his house in Long Parish, the said James Widmore told deponent that he had been informed by his bankers that it was contrary to the usage of the Bank of England to permit a transfer to be made into more than four names, and that he, the said James Widmore, had selected the parents of the children, and the two elder children, that the parents might receive the dividends until the children came of age, which dividends, with the principal funds, he, the said James Widmore, said he intended for the benefit of the four children equally, and which he, the said James Widmore, did repeatedly then and at subsequent times tell deponent. And the

[ \*526 ]

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[ \*527 ]

deponent saith, that the aforesaid conversations generally took place at the house of the said James Widmore in Long Parish, sometimes \*when he and deponent have been alone, and sometimes in the presence of the deceased William Hopkins and Ann his wife; and deponent recollects particularly the said James Widmore frequently mentioning that the said transfers were made for the benefit of the said children equally, and that the parties named in the account were mere trustees for the said four children. And deponent saith, that the said deceased James Widmore was, to the knowledge of deponent, possessed of the sum of 900*l.* per annum of Bank Long Annuities in the year 1820, and that, in the month of August, 1820, the said James Widmore, as deponent believes, did transfer the said Bank Long Annuities into the names of himself and the said deceased William Hopkins Kilpin and Ann his wife, and James Widmore Kilpin, the son of the said William Hopkins Kilpin and Ann his wife, by the name of James Kilpin; and that the said James Widmore did, some time in or about August, 1820, on the occasion of deponent attending him at his house in Long Parish, inform deponent that he had made the said transfer, and that he intended to make some further disposition of the said Bank Long Annuities, beneficial to the family of his daughter Ann Kilpin; and the deponent did, on the said and on other occasions, hear James Widmore say, that he did not intend to part with the control over the said sum of Bank Long Annuities, and that he considered he had full right to dispose of it as he thought proper.

[ \*528 ]

The evidence chiefly relied upon on the part of the defendant, Mrs. Kilpin's representative, consisted of letters addressed by the testator to Mrs. Kilpin, in some of which her right by survivorship appeared to be acknowledged, and of the deposition of John Jackson, the father of Edwin Jackson to whom Mrs. Kilpin had bequeathed \*the sums of stock in question. This witness deposed, that during his intimacy with James Widmore, he had frequent conversations with him, in which Widmore alluded to his having transferred the stock in question, and that, from the general tenor of such conversations, he understood such stock was intended for the benefit of the parties

into whose names it was transferred, more particularly as, on one occasion, Widmore said to him, "Shew me the man in the county who has put upwards of 40,000*l.* out of his power, and that for a natural child too;" and that, on another occasion, Widmore stated that such transfer would save the legacy duty.

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\*  
KILPIN.

The dividends of the 8,000*l.* 3 per cent. Consols, and 4,500*l.* South Sea stock, were received from the time of the transfer until his death by Mr. Kilpin, the husband; and from the death of the husband until Michaelmas, 1824, the dividends of those sums of stock were received by Mrs. Kilpin. The dividends of the 900*l.* Long Annuities were received by Mr. Widmore himself during his life.

In 1825, an application was made on behalf of Mrs. Kilpin to the Vice-Chancellor (Sir JOHN LEACH), to have the dividends of the three sums of stock paid to her, and an order was made to that effect, his Honour being of opinion, upon the evidence then before him, that Mrs. Kilpin was to be considered as tenant for life of those funds, with remainder for the benefit of her children.

The questions in the two causes were, whether Mrs. Kilpin, the mother, took any and what interest in the subject of the two transfers; or whether the same wholly belonged to the plaintiffs.

*Mr. Bickersteth, Mr. Tinney, and Mr. Bethell*, for the plaintiffs. [ 529 ]

*Mr. Pemberton, Mr. Wigram, and Mr. Randell*, for the representative of Mrs. Kilpin.

*Mr. Swanston and Mr. Keene*, for the trustees under the settlement of Mr. and Mrs. Kilpin.

*Sir C. Wetherell and Mr. Wright*, for the executors of the testator, James Widmore.

\* \* \* \* \*

THE MASTER OF THE ROLLS:

March 21.

This case has occupied much time, from the voluminous character of the evidence; but the points to be decided lie in a very narrow compass. I concur in the argument of the

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[ \*532 ]

defendant's counsel, that if a trust were once fastened upon the property by the testator, it could not afterwards be changed by him; and further, \*that the testimony of Mr. Coles, and the entry under the date of November, 1817, in the book A, referring to the transfer, are to be considered as the only contemporaneous evidence from which the real nature of the trust is to be collected.

The declarations of the testator to Mr. Coles are, that he intended the 8,000*l.* Consols, and the 4,500*l.* South Sea stock, as a trust for the four children equally, and that he used the names of the parents as trustees, that they might receive the dividends until the children came of age, and apply them in their maintenance and education, and not trouble him with applications for those purposes, and that he had intended to insert the names of the four children, but omitted the two younger children, because he found that the rule of the Bank of England did not permit stock to stand in more than four names. The contemporaneous entry in the book A, to which I have referred, is consistent with those declarations. The testator there states the transfer to be made for the benefit of the family, *omnibus inclusis*. It was for the benefit of the family, all included, according to the declarations made to Mr. Coles. It was for the benefit of the parents as well as the four children, because it relieved the parents from the expense of the education of the children, and the entry in the book A is to be considered as a compendious memorandum of the trust which he had created.

The trust thus created, being clear and explicit, cannot be affected by any subsequent declarations; and it is hardly necessary, therefore, to refer to subsequent entries in the books. It may, however, be observed, that the entries in the books, which are subsequent to his will in favour of James as to his real estate, are plainly considered by the testator as a recommendation only; and \*every other entry seems reconcilable with the declarations to Mr. Coles. The letters written by the testator to Mrs. Kilpin, after the death of Mr. Kilpin, could not affect the trust if they afforded the conclusion, that the testator considered all the three sums as Mrs. Kilpin's own property; but

[ \*533 ]

they are, in fact, consistent with the declarations, that the three sums were a provision for herself and her family. When, as Vice-Chancellor, I intimated my opinion, that Mrs. Kilpin was to be considered as tenant for life of those funds, these letters were the only evidence before me.

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KILPIN.

The parents were to receive the dividends for the education of all the children, and to transfer the capital to the children as they came of age; and it is much more consistent with that general intention to say that the parents were from time to time to apply the whole dividends for the education of the surviving children, than to say that the testator meant a proportion of the dividends to be withdrawn from that purpose by the death of any child under twenty-one; and it appears to me, that I best consult the intention of the testator in considering this gift as vested in the survivors upon the death of any child under twenty-one.

With respect to the Long Annuities, which were transferred into the name of the testator, and of Mr. and Mrs. Kilpin, and their son James Kilpin, the contemporaneous declaration of the testator to Mr. Coles was, that he meant to reserve to himself the annuity for his own life, and the power of disposition of it at his death for the benefit of his daughter's family. The contemporaneous entry in book A states it to be for his own use during his life, then to Mr. and Mrs. Kilpin for the benefit of their children equally at the age of twenty-one. There is this difference between these two declarations, \*that by the declaration to Mr. Coles he meant to reserve the entire power of disposition; and that by the entry in the book, he gave an interest to the parents for the benefit of the children until they came of age, and limited his power of disposition to that extent. This difference, however, is not material in the events which have happened, because either declaration equally excludes the claim of Mrs. Kilpin's executor.

[ \*534 ]

The subsequent entries in the books relating to the annuities cannot be considered as declarations of trust, but as memorandums of what from time to time he had it in contemplation to do in the exercise of his reserved power.

Upon the whole, I am of opinion that the executor of Mrs. Kilpin has no claim upon either of the three sums of stock,

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v.  
KILPIN.

and that the surviving children are entitled according to the prayers of the two bills.

1834.  
April 11, 12.

The representative of Mrs. Kilpin appealed against this decree.

April 19.

[The LORD CHANCELLOR affirmed the decree, saying, in the course of his judgment:]

[ 542 ]

In all questions of this kind, the whole circumstances attending the transfer of the property must determine whether there is an intention of advancing the child or not. A material circumstance is, if a provision has been previously made for that child or not; but this is far from being decisive. Neither can the illegitimacy of the child be permitted to exclude the supposition of advancement, if there have been a recognition and filial treatment. Nor will the joining of another person in the assignment, transfer, purchase, or other conveyance, be at all decisive, provided there appears, from the whole, to be nothing to exclude the inference of a gift which is raised from the relationship of the parties. But in the present case we have not only an ample previous provision, which of itself would not signify much; we have facts wholly irreconcilable with the intention of gift to the daughter. The coupling two of the children in the transfer, and the reason explicitly assigned for not including the other two, according to his original intention, are quite inconsistent with the notion of a gift to their mother. The whole evidence of Mr. Coles, indeed, must be struck out of the cause before we can listen to the case made for Mrs. Kilpin's legatees.

As to the other question in the cause, the Long Annuities, I see nothing upon which to hang a doubt. The contemporaneous declaration to Mr. Coles differs in one respect from the entry in the memorandum book, viz. the power which he intended to reserve to himself. But both agree in the main point alone material to Mrs. Kilpin's claim, or that of her legatees or executor, that they completely exclude the supposition of his having \*made the transfer to her jointly with himself, as a gift for her own benefit.

[ \*543 ]

The decree must, therefore, be

*Affirmed, with costs.*

BOOTH *v.* DEAN.

(1 Myl. &amp; Keen, 560; S. C. 2 L. J. (N. S.) Ch. 162.)

A bequest of a year's wages to each of the testator's servants, over and above what may be due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year.

1833.  
May 10.  
*Rolls Court.*  
LEACH, M.R.  
[ 560 ]

THE will of Augustus Schutz contained the following words: "I give to each of my servants one year's wages over and above what may be due to them at the time of my decease."

Upon this bequest a question was made, whether a person who had worked in the testator's garden, under his gardener, for several years, at weekly wages, and a boy who had served the testator for some time as a cow-boy, at weekly wages, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled, under the will, to the year's wages.

THE MASTER OF THE ROLLS was of opinion that these persons were not servants in the sense in which the testator had used the expression. In speaking of a year's wages, the testator plainly used that expression with reference to family servants, usually hired by the year.

DOWN *v.* WORRALL (1).

(1 Myl. &amp; Keen, 561—564.)

A testator gave his residuary personal estate to the trustees named in his will, their executors, administrators, and assigns, upon trust to apply the same as he should appoint; and in default of appointment as to any part, he directed the trustees to settle such part at their discretion, either for pious and charitable purposes, or otherwise for the benefit of the testator's sister and her children: Held, that this was a personal trust, which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes, or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next of kin.

1833.  
May 25.  
*Rolls Court.*  
LEACH, M.R.  
[ 561 ]

THE testator, James Pell, disposed of his residuary personal estate in the following words: "And as to all the surplus or residue of my monies, stocks, funds and other personal estate

(1) *Crawford v. Forshaw*, '91, 2 Ch. 261, 60 L. J. Ch. 683, 65 L. T. 32.

DOWN  
v.  
WORRALL.

and effects, other than leases for years or monies to arise therefrom, I give and bequeath the same to my trustees and executors, John Worrall, and Sarah Worrall, their executors, administrators, and assigns; but nevertheless upon the trust, and to and for the intent that they shall and do pay, and apply the same to and for such intents and purposes, and in such manner as I shall at any time during my life by any codicil or codicils to this my last will and testament, or by any note or memorandum in writing under my hand, or in any other handwriting, whether signed by me or otherwise, order, direct, or appoint, of or concerning the same; and in default of my leaving any such order, direction, or appointment, as aforesaid, as to any part of my residuary estate, I leave it to my said trustees to settle such part thereof, either to or for charitable or pious purposes, at their discretion, or otherwise for the separate benefit of my sister, independent of her husband, and all or any of her children, in such manner as my said trustees shall think fit, and so that my said brother-in-law shall have no interest whatsoever therein."

[ \*562 ]

The testator died without making any appointment of his residuary estate; and after his death his trustees and \*executors applied a part of it for the benefit of his sister and her children, and they settled some other portion of it for charitable uses; but the survivor of them died leaving a sum of 500*l.*, which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children; and the questions in the cause were, first, whether the representative of the surviving trustee could exercise the discretion given by the testator; secondly, whether the fund was undisposed of; and thirdly, whether the fund was applicable to charitable purposes under the direction of the Court.

*Mr. Sidebottom*, for the next of kin :

In this case the representative of the surviving trustee declines to execute the power of appointment given to the trustees under the will, either for charitable purposes, or in favour of the testator's sister and her children. It is extremely doubtful whether any power survives to him; but, supposing it to survive, and he refuses to exercise it, the Court will then declare

the fund to be undisposed of. There is no ground for contending that this is such a charitable legacy as the Court will execute upon failure of the trustees to carry the charitable intentions of the testator into effect. It is a personal trust reposed in the trustees, either to apply the fund to charitable purposes, or to apply it otherwise for the benefit of the persons mentioned in the will, at their discretion; and the Court is in no event called upon to interfere: *Morice v. The Bishop of Durham* (1). \* \* \*

DOWN  
↑  
WORRALL.

*Mr. Wray*, for the Crown :

[ 563 ]

\* \* It is settled, that where a testator has reposed a personal confidence in trustees or executors to dispose of a fund in charity at their discretion, and no such disposition has been made, the Court will not vest this discretion in the representatives of the trustees or executors: *Hibbard v. Lambe* (2). The charitable purposes of the testator, however, will not be suffered to fail from the default of the trustees, but will be executed either by the Crown or under the direction of this Court: *Moggridge v. Thackwell* (3). \* \* \*

#### THE MASTER OF THE ROLLS :

Where a disposition is made in favour of charity and the trustee fails, the Court will interfere and execute the trust; but here no disposition is made in favour of charity as to the unappointed part. The trustees had a \*personal discretion as to the application of the fund; and, as they have died without exercising that discretion, this part of the property is undisposed of by the testator, and belongs to the next of kin.

[ \*564 ]

(1) 7 R. R. 232 (9 Ves. 399).  
(2) Amb. 309.

(3) 6 R. R. 76 (7 Ves. 36).

1833.  
May 25.

*Rolls Court.*  
LEACH, M.R.  
[ 564 ]

# ALSOP v. LORD OXFORD (1).

(1 Myl. & Keen, 564—567; S. C. 2 L. J. (N. S.) Ch. 174.)

Where it is the usage of the profession that certain business should be intrusted to an agent in London, a country solicitor will not be allowed to charge for his attendance in London to perform that business, although his client has requested his attendance, unless the solicitor has first explained to his client that, by the usage of the profession, such attendance is considered to be unnecessary.

The comparison of an abstract of title with the title deeds is business within this rule, and a country solicitor will not be allowed to charge for his personal attendance in London in respect of such business.

A PETITION was presented by a solicitor, residing in Worcestershire, praying that it might be referred to the Master to review his taxation of the petitioner's costs. Among other items, the reduction of which was complained of, was a charge of 54*l.* for a journey made by the petitioner to London, for the purpose of comparing an abstract of the title with the title deeds. The petitioner stated, by affidavit, that he had been occupied sixty hours in this comparison; that he had been absent from his residence thirteen days; and that he had made the journey to London at the instance and request of his client. The Master disallowed this item, on the ground that the comparison of abstracts with the deeds was business not requiring the personal attendance of a solicitor, and which, according to the usage of the profession, ought to have been done by an agent in London; he accordingly reduced the charge to 20*l.*, being at the rate of 6*s.* 8*d.* an hour, the usual charge for the attendance of a solicitor's clerk for this purpose.

[ 565 ]

*Mr. Bickersteth* and *Mr. Piggott*, for the petitioner.

*Mr. Pemberton* and *Mr. Koe*, *contra*.

[ 566 ]

THE MASTER OF THE ROLLS :

\* \* It is said that the Master here has acted upon a mistaken principle; that the client here required the attendance of the solicitor in London, and ought, therefore, to pay for that attendance. That fact is questionable upon the affidavit. The

(1) *In re Snell* (1876) 5 Ch. D. 815, 36 L. T. 534.

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LORD  
OXFORD.

judgment of the Master assumes as a fact, that, by the usage of the profession, the comparison of the deeds with the abstract would have been properly entrusted to an agent. Even if it were clear that the client did request the solicitor to proceed to London for the purpose, it would not vary the case, unless the solicitor proved that he distinctly informed his client that it was not by the usage of the profession considered to be necessary that such expense should be incurred. It was the duty of the solicitor to give this explanation to the client; and if, after this explanation, the client had requested the attendance of the solicitor in London, he would properly be charged with the expense, and there is no Master who would, under such circumstances, have refused to allow it. The client here was himself but a trustee, and had no personal interest in the subject, and the duty of the solicitor to give this explanation was specially imperative. If, therefore, \*in this case, the client did request the attendance of the solicitor in London, and that fact was proved before the Master, yet, it not being pretended that the required explanation was given to the client, the Master appears to me to have acted upon very proper principles, and, for the sake of example, I must

[ \*567 ]

*Dismiss this petition with costs.*

## HOBSON v. BLACKBURN.

(1 Myl. & Keen, 571—581; S. C. 2 L. J. (N. S.) Ch. 168.)

A devise of messuages or tenements with the appurtenances, to uses applicable only to freehold property, may comprise leasehold property, which is blended in enjoyment with the freehold.

Where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant.

THE testator John Blades [by his will gave unto the Rev. Edwin Rodgers and his (the testator's) daughter Caroline Rodgers, his wife, the liberty of residing in, and occupying and using during their joint lives, the capital messuage or dwelling-house lately built by him on part of his estate at Brixton aforesaid, and the offices, gardens, and pleasure grounds thereto

1833.  
June 5, 6, 10.

*Rolls Court.*  
LEACH, M.R.  
[ 571 ]

HOBSON  
v.  
BLACKBURN.

belonging, and also ten acres of land or thereabouts adjoining, or immediately surrounding the same, and he gave his messuages or tenements, with the appurtenances, in Ludgate Hill and Ludgate Street, in the city of London, also his freehold farm at Chigwell in the county of Essex, with the buildings and lands thereto belonging, also his freehold estate called Severndroog Castle at or near Shooter's Hill in the county of Kent, with the lands and grounds thereto adjoining, also his freehold farms situated in the parishes of East Peckham and Nettlestead, or one of them, in the county of Kent, which he purchased of the assignees of William Blunden, and also all other his freehold messuages, lands, tenements, and hereditaments (except his freehold messuages in Fleet Street hereinafter devised), with the rights, members, and appurtenances, unto his nephew] Joshua Hobson of Stamford Hill in the county of Middlesex, and Robert Currey of Herne Hill in the county of Surrey, Esqs., their heirs and assigns, to the uses and upon the trusts hereinafter expressed and declared.

[ 573 ]

The testator then proceeded to limit part of the devised premises to the use of his daughter, Elizabeth Blackburn, and her issue in strict settlement, and the remainder of the devised premises to his daughter, Caroline Rodgers, and her issue in strict settlement, with cross remainders between the two daughters and their issue, and he concluded this devise with words to the following effect: "And in default of issue of both my said daughters, then as to, for, and concerning all my said freehold lands, tenements, and hereditaments whatsoever and wheresoever to such person as shall be the right heir of my late wife, Hannah Blades, and the heirs and assigns of such person for ever."

It appeared by the report of the Master at the original hearing, that the testator had, in 1815, two freehold houses adjoining each other, situated respectively in Ludgate Hill and Ludgate Street, in the former of \*which he carried on his business of a glass-seller, and that in 1815 he took a lease for twenty-one years of certain ground in Little Bridge Street, which ran behind his two houses, and that in that year he united that part of the leasehold ground which was behind the

[ \*574 ]

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freehold house in Ludgate Hill, which he occupied himself, to that freehold house, using the freehold and leasehold together for the purposes of his trade, from that time until the making of his will, and his death; and leaving no other access to the leasehold part than by its communication with the freehold; and in like manner in the same year he united that part of the leasehold ground which was behind his freehold house in Ludgate Street to that freehold house, and let the same together to a Mr. Eyles, who used both freehold and leasehold for the purposes of his trade, there being no communication with the leasehold except through the freehold, and Mr. Eyles continued to occupy the premises in that manner at the date of the will, and until the testator's death.

A question arose before the Master between Mr. and Mrs. Blackburn and Mr. and Mrs. Rodgers, respecting the situation of the ten acres of ground which by the will of the testator Mr. and Mrs. Rodgers were entitled to occupy with the dwelling-house built by the testator in his lifetime at Brixton; and the Master having adopted the proposal of Mr. and Mrs. Blackburn in that respect, an exception was taken to that part of his report.

The cause now came on to be heard for further directions on the Master's report, and the two material questions were, whether the leasehold premises, occupied with the freehold houses in Ludgate Hill and Ludgate Street, passed with the freehold under the general devise \*to the trustees, and whether it was fit to adopt the proposal of Mr. and Mrs. Blackburn, or the proposal of Mr. and Mrs. Rodgers, as to the situation of the ten acres of the ground to be occupied with the house at Brixton.

[ \*575 ]

With respect to the latter point, the MASTER OF THE ROLLS stated it to be a principle of law, that where a grant was general of ten acres adjoining or surrounding a house, part of a larger quantity, the choice of such ten acres adjoining or surrounding was in the grantee, and that a devise was to be considered as a grant, and he allowed the exception taken by Mr. and Mrs. Rodgers to the Master's report in that behalf.

On the first point, *Mr. Bickersteth* and *Mr. James*, for the

HOBSON  
v.  
BLACKBURN.  
[ 577 ]

plaintiffs, [cited *Addis v. Clement* (1), *Lowther v. Cavendish* (2), *Roe dem. Pye v. Bird* (3), *Turner v. Husler* (4), *Lane v. The Earl of Stanhope* (5), and *Doe v. The Earl of Lucan* (6).] In the present case, the testator devised his messuages or tenements, with "the appurtenances," in Ludgate Hill and Ludgate Street; and by "appurtenances," he plainly intended to pass the leasehold property adjoining to and blended with the freehold. In *Doe dem. Lempriere v. Martin* (7), it was held that land occupied with a house, and highly convenient for the use of it, would pass in a will by the "appurtenances," though held for a different term. \* \* \*

[ 578 ]

*Mr. Pemberton*, on the other side, contended that the present case fell within the rule in *Rose v. Bartlett* (8). \* \* As to the word "appurtenances," that must be considered as referable only to the subject of the devise, and, if the testator had clearly devised freehold only, could not be extended to property not included in the terms of the gift. All the cases which had been distinguished from *Rose v. Bartlett* depended upon special circumstances, which were not to be found in the present case. [He also cited *Chapman v. Hart* (9), *Knotsford v. Gardiner* (10), and *Thompson v. Lady Lawley* (11).]

June 10.

#### THE MASTER OF THE ROLLS:

[ 579 ]

It is now to be considered as settled, by the case of *Rose v. Bartlett*, that a testator having freehold and leasehold property in the same place, by a devise of his lands and tenements in that place passes only his freehold lands, unless there be other words importing a different intention; and, according to the decision of Lord ELDON in *Thompson v. Lady Lawley*, with which decision I entirely concur, a testator having freehold and leasehold property situate in the same place, is by a devise of his messuages, lands, tenements, and hereditaments, in that

(1) 2 P. Wms. 456.

(2) Amb. 356, and 1 Edw. 99.

(3) 2 Black. 1301.

(4) 1 Br. C. C. 79.

(5) 3 R. R. 197 (6 T. R. 345).

(6) 9 East, 448.

(7) 2 Black. 1148.

(8) Cro. Car. 292.

(9) 1 Ves. Sen. 271.

(10) 2 Atk. 450.

(11) 5 R. R. 595 (2 Bos. & P. 303).

place, to uses applicable only to freehold property, to be considered as intending only to devise his freehold estate in exclusion of the leasehold. HOBSON  
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BLACKBURN.

These cases and all others upon the subject admit that if a different intention on the part of the testator can be clearly collected either from words of description used in the will, or from the circumstance of the leasehold property being blended in enjoyment with the freehold, that leasehold property will pass, although \*the limitations be to uses strictly applicable to freehold property only. [ \*580 ]

In this case, the testator for many years carried on his trade in a freehold house, No. 5, in Ludgate Hill, and in the year 1815 he took a lease for twenty-one years of premises in Little Bridge Street, which is behind Ludgate Hill, and part of such leasehold premises adjoining backwards to his house in Ludgate Hill he threw into his house, and occupied therewith for the purpose of his trade, from 1815 till the time of making his will, and his death; there being no entrance to the leasehold part other than by its communication with the freehold part. The testator had also a freehold house in Ludgate Street, which, about ten years before his death, he let to a Mr. Eyles, together with other part of the said leasehold premises taken by him in 1815, and which part of the leasehold adjoined backward to Mr. Eyles's house and was thrown into and occupied with it by Mr. Eyles for the purposes of his trade, the leasehold having no other access than from the freehold part, in like manner with the freehold and leasehold premises occupied by the testator.

The property in Ludgate Hill and Ludgate Street is included in a devise to trustees limited to uses strictly applicable only to freehold property; other property comprehended in one part of the same devise, which immediately precedes this property, is described "all other my messuages, lands, and hereditaments in Brixton;" and other property comprehended in that part of the same devise, which immediately succeeds this property, is described as "also my freehold estate called Severndroog Castle." The property in Ludgate Hill and Ludgate Street is thus described, "also my messuages \*or tenements, with the appurtenances, in Ludgate Hill and Ludgate Street." [ \*581 ]

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BLACKBURN.

The description of messuages or tenements, with the appurtenances, will plainly comprise this leasehold property; and the manner in which the leasehold was blended in enjoyment with the freehold rebuts the presumption that the testator could mean to separate the leasehold from the freehold. My judgment, therefore, is, that it is clearly to be collected that the testator did intend that this leasehold should pass with the freehold by this devise, notwithstanding that the limitations, strictly speaking, are applicable to freehold property.

It was observed in argument that the ultimate limitations of all the property thus devised upon failure of the testator's daughters and their issue is in these words, "then as to, for, and concerning all my said freehold messuages, lands, tenements, and hereditaments whatsoever and wheresoever;" and that this passage plainly indicated an intention to pass by this devise only freehold property. It must be admitted that this passage, like the freehold limitations, is a circumstance of evidence to that effect; but, like the freehold limitations, it is overborne by the other circumstances which I have relied upon.

1833.  
June 20.

*Rolls Court.*  
LEACH, M.R.  
[ 582 ]

### WILKINSON v. HENDERSON (1).

(1 Myl. & Keen, 582—589; S. C. 2 L. J. (N. S.) Ch. 191.)

In a suit by a joint creditor against the representatives of a deceased partner, and the surviving partner, the plaintiff was held to be entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent.

The surviving partner is properly joined as a defendant in such a suit, being interested to contest the demand of the plaintiff, and of all joint creditors, but the remedy against him is altogether at law.

THE plaintiff was a creditor of the partnership firm of Shepherd and Hartley, and Shepherd having died, the bill was filed by the plaintiff on behalf of himself, and all other the joint-creditors of Shepherd and Hartley, against the executors of Shepherd, and against Hartley, the surviving partner; and it prayed payment of the partnership debts out of the estate of Shepherd. On the part of the defendants, the executors of Shepherd, it was objected,

(1) *In re Doetsch*, '96, 2 Ch. 836, 65 L. J. Ch. 855, 75 L. T. 69.

that no decree could be had for payment of the partnership debts out of the estate of Shepherd, inasmuch as it did not appear that Hartley, the surviving partner, was insolvent. WILKINSON  
v.  
HENDERSON.

*Mr. Pemberton and Mr. J. Russell* for the plaintiff [relied on *Sleech's* case (1).]

*Mr. Bickersteth and Mr. Duckworth*, for the executors of Henderson : [ 584 ]

The principle upon which almost all the cases on this subject proceed is, that the creditor is entitled to relief against the assets of the deceased partner, through the medium of the equities subsisting between the partners themselves; and these equities, in respect of creditors, are, that joint debts shall be satisfied out of the joint estate, and that the separate estates of the partners shall not be liable to the demands of the creditors until the insufficiency or insolvency of the joint estate is established. \* \* In *Gray v. Chiswell* (2), Lord ELDON says, it would be extraordinary if the creditor should have a better remedy, in consequence of the death of the partner, than if the partner had lived, and when, by reason of the partner's death, the remedy at law was gone. *Ex parte Kendall* (3), and *Campbell v. Mullett* (4), both shew that the remedy of the creditor against the assets of the deceased partner is founded upon the equities of the partners themselves. Even *Sleech's* case does not establish, without modification, the right of the creditor to resort to the estate of the deceased partner, nor can any case be produced in which relief was sought against the estate of the deceased partner, without any allegation on the part of the plaintiff that payment could not be obtained by the creditor from the surviving partner. In *Cowell v. Sikes* (5), the joint creditor received payment from the deceased partner's estate *pari passu* with the separate creditors; but he was not permitted to resort to the deceased partner's estate until the insolvency of the joint estate was ascertained. \* \* \*

In no case, at any rate, has a creditor been permitted to resort to the estate of the deceased partner, where a surviving partner, [ 585 ]

(1) 15 B. R. 155 (1 Mer. 539).

(2) 7 B. R. 151 (9 Ves. 118).

(3) 11 B. R. 122 (17 Ves. 514).

(4) 19 B. R. 127 (2 Swanst. 551).

(5) 26 B. R. 46 (2 Russ. 191).

WILKINSON who is solvent, or whose insolvency is not proved, has been made  
 HENDERSON. a party to the suit. \* \* \*

*Mr. Koe*, for the defendant *Hartley*, contended, that as the bill sought no relief against the surviving partner, it must be dismissed as against him.

*Mr. Pemberton*, in reply :

[ \*587 ] It is charged in the bill, and admitted by the answer, that all the separate debts of the deceased partner have been paid. As the separate estate of the deceased partner, \*therefore, is, in equity, liable, after satisfaction of his separate debts, to the debts of the partnership, the joint creditor in this case has a clear right to resort to the assets of the deceased partner for satisfaction of his debt, even though there be a surviving partner, and that surviving partner may, for aught that is proved to the contrary, be solvent. \* \* \*

[ 588 ] THE MASTER OF THE ROLLS :

All the authorities establish that, in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and that, the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that, if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is, whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall

appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is at all events liable to the full satisfaction of the creditors, and must first or last be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and, further, that according to the two decisions in *Sleech's* case in the cause of *Devaynes v. Noble*, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable, as between the partners, without first having resort to dividends which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner.

The remedy against Hartley, the surviving partner, is altogether at law, and I can make no decree against him; but he was properly joined as a defendant to the suit, being interested to contest the demand of the plaintiff, and of all other persons claiming to be joint creditors.

WILKINSON  
v.  
HENDERSON.

[ \*589 ]

### ST. GEORGE v. WAKE.

(1 Myl. & Keen, 610—626; S. C. Coop. temp. Brough. 129.)

A lady, pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister: Held, that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud upon his marital right.

Relief against a disposition of property by the intended wife, pending a treaty of marriage, can only be given where the husband has been kept in ignorance of the transaction; and *semble*, that, in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided on the ground of fraud upon the marital right, the Court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means.

THE original bill was filed by the Rev. Henry St. George and Sarah his wife against Charles Wake and Martha his wife, and

1831.  
June 30.  
July 2, 5.  
Rolls Court.  
LEACH, M.R.  
1833.  
July 19, 20,  
22.  
Aug. 3.  
Lord  
BROUGHAM,  
L.C.  
[ 610 ]

ST. GEORGE Henry Eyres Landor ; and it prayed that certain deeds executed  
 v. in November, 1829, by Sarah St. George, shortly before her  
 WAKE. marriage with the plaintiff Henry St. George, might be declared fraudulent and void, and might be delivered up to be cancelled.

The bill stated that in the months of September and October, 1829, the plaintiff Sarah St. George, then Sarah Noble, spinster, was residing at Cheltenham with her aunt Sarah Daniel, and that an intimacy commenced between the plaintiff Henry St. George and Mrs. Daniel, which led to an acquaintance between the plaintiffs, and that ultimately a marriage between the plaintiffs was agreed upon with the consent and approbation of Mrs. Daniel, and that such intended marriage was well known to the defendant Landor, who had long been the confidential adviser and solicitor of Mrs. Daniel, and also to the defendant Charles Wake and to Martha his wife, who was the sister of Sarah Noble, but who had not been upon friendly terms with her aunt Mrs. Daniel, by reason of her having married without her aunt's approbation. The bill further stated, that in October, 1829, Mrs. Daniel and Miss Sarah Noble returned from Cheltenham to the residence of the former at Warwick ; that the plaintiff Henry St. George, who was a native of Ireland, was compelled to return, and \*did return, to that country : and that on the 15th of the following November, Mrs. Daniel died, having made a will, which had been prepared by the defendant Landor, who was named one of the executors, whereby she gave the interest of 2,000*l.* to the defendant Martha Wake for her life, to her separate use, and the principal to her issue if she had any, and if no issue, then she directed one moiety of the said sum of 2,000*l.* to be paid to Sarah Noble, and the other moiety to Margaret Nichols, another niece of the testatrix ; and she bequeathed the residue of her property, after payment of her debts and legacies, to Sarah Noble.

The bill alleged that upon the death of Mrs. Daniel, the defendants Wake and his wife, and Landor, knowing that the plaintiff Henry St. George was then absent in Ireland, but that he was expected shortly to return to fulfil his contract of marriage, concerted a scheme for inducing Sarah Noble to make over some of her property to her sister Martha Wake, and that in pursuance of that scheme, Landor on the night of the 15th of November

wrote and sent a letter to Sarah Noble, containing, among others, the following passage: "When I last saw Mrs. Daniel, this day fortnight, she told me that in consequence of your intended marriage, she should make another will, and do something more for Mrs. Wake: what that was, she did not mention. Now allow me to suggest to you for consideration, whether it would not promote amity, if you wrote to Mrs. Wake and stated to her that as your aunt had given over to you 1,000*l.* of the legacy in case she (Mrs. Wake) died without children, you would release that reversion to her, if she would wish to have the power of disposal over it in case she had no children." The bill went on to state that Miss Noble, without reflecting that, under the circumstance of her being engaged to marry the plaintiff Henry St. George, she was not competent to dispose of her property, did \*on the 16th of November accede to the proposal of Landor, that she should give up her reversionary interest in the said sum of 1,000*l.* in favour of her sister.

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WAKE.

[ \*612 ]

The bill further stated, that on the same 16th of November, Mr. Hutchinson, who was a solicitor connected with the family of the testatrix, made a proposal to Miss Noble to assign to her sister, Mrs. Wake, four Liverpool Dock bonds, of the value of 1,200*l.*, which Miss Noble possessed in her own right, instead of releasing her reversionary interest in the legacy; that ultimately Miss Noble was prevailed upon to consent to the assignment of the Liverpool Dock bonds, as well as to the release of her reversionary interest in the legacy; that such consent was obtained on the 17th of November, and that Landor sat up the whole or the greater part of the night, between the 17th and 18th of November, to prepare two deeds of assignment, which were executed by Miss Noble on the 18th, whereby the Liverpool Dock bonds, and her reversionary interest in the legacy, were respectively assigned to her sister Martha Wake. The bill further stated, that, shortly after these transactions, the plaintiff Henry St. George returned to Warwick, and the 14th of December intermarried with the plaintiff Sarah St. George, and that there was no issue of the marriage between the defendant Wake and Martha his wife.

The original bill was filed on the 19th of January, 1830;

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Mrs. St. George died on the 26th of October, 1890; and the suit was revived by the plaintiff Henry St. George, as administrator to her estate.

[ \*613 ]

The defendants Wake and his wife, by their answer, admitted that the assignments were executed by Mrs. St. George without pecuniary consideration; but they denied that such assignments were fraudulently procured, \*and insisted that they were free and unconstrained gifts on the part of Mrs. St. George.

The defendant Landor, by his answer, stated that, in 1817, the testatrix Mrs. Daniel took her two nieces, then Sarah Noble and Martha Noble the defendant, to reside with her; that she executed one or more wills, in which she provided for them equally, and always treated them with equal favour until the year 1824, when the defendant Mrs. Wake disobliged Mrs. Daniel by her marriage; but that Mrs. Daniel became reconciled to the defendant long before her decease: that Mrs. Daniel had, shortly before her death, communicated to the defendant, as her confidential adviser, her intention of making a new will, and doing something more for Mrs. Wake, if the marriage, then in contemplation between Mr. St. George and Sarah Noble, should take effect: that the testatrix had instructed the defendant to make inquiries as to the accuracy of Mr. St. George's representations respecting the estates of his father and his own prospect of obtaining a living of 1,200*l.* a year; and that, upon making such inquiries, it turned out that the family property was very limited, and that there was no foundation for the representation respecting the living: that Mrs. St. George placed great confidence in the defendant Landor; and that the deeds in question were executed by his advice, for the purpose of fulfilling, to a certain extent, the wishes and intentions of the testatrix, and of re-establishing affection between the two sisters: that the assignments were free and unconstrained gifts; and that Mrs. St. George was of mature age and discretion at the time of making them, being thirty-eight years old.

[ \*614 ]

There was no positive evidence that Mr. St. George knew, previously to his marriage, that the assignments had been made; but it was not alleged in the bill that \*the transaction was concealed from him; or that he was ignorant of the assignments

having been made at the time of his marriage. No settlement was made by Mr. St. George upon his marriage with Miss Noble, and it did not appear that he was possessed of any property which could have been made the subject of a settlement.

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*Mr. Pemberton and Mr. Koe, for the plaintiff:*

\* \* The title to relief against fraud upon the marital or ante-nuptial right is fully established by the cases: *Carleton v. Earl of Dorset* (1), *Blanchet v. Foster* (2), *Strathmore v. Bowes* (3), *Goddard v. Snow* (4). It is evident, in the present case, that Mr. Landor and the Wakes colluded to deprive this lady of her property. What motive could there be, except the fear of Mr. St. George's return, for the extraordinary precipitation with which the deeds were prepared? When once a treaty of marriage is entered into, the woman is as incapable of disposing of her property before the completion of the contract, as she is after the marriage has taken place.

*Mr. Bickersteth and Mr. J. Russell, for the defendants*  
*Mr. and Mrs. Wake:*

\* \* It is clear that Mr. St. George knew, previously to his marriage, of the assignments having been made, and that he might, if he had thought proper, have retired from the engagement; but it did not suit the plaintiff to abandon a lady with a fortune of 90,000*l.* because he could not obtain, in addition to that fortune, a sum of 2,000*l.* or 3,000*l.*, which the lady's kindness and generosity had induced her to give to a sister in less fortunate circumstances. \* \* \*

[ 615 ]

*Sir C. Wetherell and Mr. Lynch, for the defendant Landor.*

[ 616 ]

*Mr. Pemberton, in reply:*

\* \* The circumstances under which the assignments were obtained constituted a fraud upon the lady, as well as upon the surviving plaintiff in the suit; and, if the marriage had never

(1) 2 Vern. 17.

J. 22).

(2) 2 Ves. sen. 264.

(4) 25 R. R. 111 (1 Russ. 485).

(3) 1 R. B. 76 (2 Cox, 28, 1 Ves.

ST. GEORGE    taken effect, she, or her representatives after her death, might  
                   v.  
 WAKE.        have set aside the assignments in this Court.

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[ \*617 ]

The transaction between this lady and her sister was one which, under all the circumstances, might well have taken place between such near relations without being liable to any imputation of fraud. As there is no evidence that the transaction was concealed from the plaintiff, and as there is no allegation in the bill of such concealment, or of the plaintiff's ignorance, before the marriage, of the assignments having been made, it is to be presumed that the plaintiff had notice of the assignments previously to the marriage; and if a person is acquainted before his marriage with the fact \*of an assignment of property made by his intended wife, such assignment cannot be said to be a fraud upon his marital right. If he still thinks fit to marry the lady, he cannot reasonably complain that he is deceived or defrauded. I will, however, look into the cases on this subject.

With respect to Mr. Landor, it must be observed that his conduct was not such as his professional duty required. On the 15th of November he writes to Miss Noble, suggesting to her the propriety of parting with her interest in the sum of 1,000*l.*, to which she was entitled under the will of Mrs. Daniel in case of Mrs. Wake dying without children, of which there was great probability, as Mrs. Wake had been married many years, and had no child. On the 16th, at the suggestion of Mr. Hutchinson, another solicitor, Miss Noble is induced to part with her Liverpool Dock bonds. On the 17th, Mr. Landor sits up till a late hour in the night to prepare the two deeds of gift, which are executed by this lady on the 18th. The necessary inference is, that the deeds were prepared with all this haste and precipitation, lest Miss Noble's willingness to acquiesce in the suggestions which had been made to her should be altered by the return of her intended husband. It is impossible that Mr. Landor could be ignorant, in fact it would be inconsistent with parts of his own testimony to suppose him ignorant, that this lady was under an engagement of marriage with Mr. St. George. For these reasons, if I shall be ultimately of opinion that this

bill ought to be dismissed, I shall not give Mr. Landor his costs.

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July 5.

[ \*618

His Honour stated, on a subsequent day, that he had looked into the authorities, and had not found any case \*which went the length of establishing the proposition that if a person, who had entered into a treaty of marriage with a lady, knew of a gift made by the lady pending such treaty, and nevertheless thought fit afterwards to marry her, the gift could be considered as void in this Court. At law, if a lady secretly disposed of a part of her property, after a contract of marriage, the contract was thereby avoided; and proof of this secret disposition was a valid defence, if an action were brought against the intended husband for breach of the promise of marriage.

His Honour again commented upon the improper precipitation with which the deeds of assignment had been prepared, and stated that, under these circumstances, he could not give to Mr. Landor, or to the other parties, defendants to this suit, their costs. The bill was accordingly

*Dismissed without costs.*

The plaintiff presented a petition of appeal.

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*Sir E. Sugden and Mr. Koe*, for the plaintiff.

*Mr. Knight and Mr. J. Russell*, in support of the decree.

*Sir C. Wetherell and Mr. Lynch*, for the defendant Landor.

The cases cited in the argument upon the appeal are stated and commented upon in the judgment of the LORD CHANCELLOR.

THE LORD CHANCELLOR :

Aug. 3.

[ 619 ]

This was a suit instituted by Mr. St. George and his wife to set aside a deed, by which she conveyed to her sister, Mrs. Wake, her reversion expectant upon Mrs. Wake's death without issue, in the sum of 1,000*l.* left by their aunt's will, and also an assignment to Mrs. Wake of four Liverpool Dock bonds, worth 1,200*l.*; both gifts being, it was alleged, obtained by fraud from

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Mrs. St. George, then Miss Noble, and both gifts being, it was further alleged, made while the marriage, which four weeks after took effect, between the two plaintiffs was in contemplation.

It is admitted that the deeds were without consideration; and the first ground on which it is sought to impeach them is that of fraud or surprise; advantage being, it is said, taken of Miss Noble's distress of mind, and no one being present to advise her except Mr. Landor, the aunt's solicitor, who suggested the release of the reversion, and Mr. Hutchinson, a friend of the family, who advised the assignment of the bonds.

But I am clearly of opinion that the case of fraud and surprise fails altogether. Mr. Landor had no interest whatever in the transaction, nor apparently had Mr. Hutchinson; and both might most fairly advise the arrangement in the relative situation of the two sisters, one of whom had just been disappointed by the aunt's will, which there is reason to believe Mr. Landor knew she had intended, but for her sudden death, to alter. Miss Noble, too, was a person of mature age, between thirty and forty, and apparently not without some knowledge of business. The evidence furnishes some details of a scene between the sisters, in which Mrs. Wake is alleged to have conducted herself with some violence: \*that evidence, however, is far from being unexceptionable; and if it were, it would not by any means be sufficient to invalidate the gift. Strong expressions of feeling are incident to family disputes, and often mix themselves with arrangements by which such differences are allayed, without giving to the party induced to make concessions for so desirable an object any right afterwards to set them aside.

[ \*620 ]

The other and the main ground of reliance is, that the deeds were in fraud of the intended husband's rights, upon the principle that a voluntary conveyance by a woman, while marriage is in contemplation, is avoidable by the husband from whom it was concealed, or who, at least, had no notice of it. This principle has been often laid down, but it has been very rarely acted upon to the extent of avoiding by judicial decision a conveyance in fraud of the future husband's rights.

In almost all the cases where the principle is recognised, there were circumstances which the Court laid hold of to escape from

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the application of the rule, or which really took those cases out of the rule. Thus, in *Hunt v. Matthews* (1), *King v. Cotton* (2), *Strathmore v. Bowes* (3), *Ball v. Montgomery* (4), and *Blanchet v. Foster* (5), there were abundant acknowledgments of the rule by *dicta*, but in some of them, from the husband having had notice, and in the last, from the bond having been given for a valuable consideration, there was no decree to set the transaction aside. In other cases where there were decrees, the facts raising the question seem to have been mixed with special circumstances. Thus, *Poulson v. Wellington* (6), turned upon a recital in the settlement, which the Court and afterwards the House of Lords held to be an appointment, and so to prevent the conveyance made before the marriage in default of appointment from taking effect.

[ \*621 ]

Even *Carleton v. Dorset* (7), always supposed to be a plain decision on the principle, is incumbered with the statement, at least in the report, that “the wife being crazed in her understanding, endeavoured to run away from her husband and stirred up her creditors against him,” and with the corrected statement in the note, that the defendants, her trustees, stirred up the creditors against the husband, the settlement in question being one to her separate use. The case of *Edmonds v. Dennington*, cited in *Carleton v. Dorset*, proves nothing, for it was only that a second husband is not bound by a settlement made on a former marriage, of which settlement he had no notice, and which gave the wife power to act as a *feme sole* notwithstanding that first marriage. So *Lance v. Norman* (8), was a case of gross fraud and even conspiracy; and in *Howard v. Hooker* (9), the marriage treaty, which had been broken off, was renewed by representations that the husband was to have the wife’s fortune, in consideration of which he made a handsome settlement upon her.

How far the existence of a fraud upon the husband is necessary to the application of the rule, appears both from the *dicta* of Lord THURLOW in *Strathmore v. Bowes* (10), and of Mr. Justice

(1) 1 Vern. 408.

(2) 2 P. Wms. 674.

(3) 1 R. R. 76 (1 Ves. J. 22).

(4) 2 R. R. 197 (2 Ves. J. 191).

(5) 2 Ves. sen. 264.

(6) 2 P. Wms. 533.

(7) 2 Vern. 17.

(8) 2 Ch. Rep. 59.

(9) 2 Ch. Ca. 81.

(10) 1 R. R. at p. 78 (1 Ves. J. 28).

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[ \*622 ]

BULLER in the previous discussion of the same case (1) ; but still more clearly \*from two decisions, one of *Thomas v. Williams* (2), where the release of a legacy without consideration during a treaty of marriage was supported against the husband on the ground that he had never inquired after the bequest, and another of *De Manneville v. Crompton* (3), where Lord ELDON held that the husband could not be relieved against the voluntary giving up (for family reasons, which made it very fair to do so,) of a promissory note to a large amount, after instructions for the settlement had been given, though that settlement gave him a contingent interest in all the wife's bonds and notes vested in trustees, and the promissory note was the only instrument of that description. Lord ELDON decided the case on the ground that there was no evidence of the marriage taking place upon a representation of the particulars or amount of property, and he considered that he should have gone beyond any precedent had he decided otherwise.

Neither of these cases appears to have been cited in *Goddard v. Snow* (4), where the principle has been carried further than in any other case. From the peculiar circumstances, that is certainly a strong decision, the husband never having known of the existence of the property, or, indeed, of any property belonging to his wife, and the conveyance having taken place a long time before the marriage. But there was also great specialty in the case, and manifest contrivance and concealment.

[ \*623 ] It thus appears how little positive decision there is upon the point, independent of all special circumstances. The cases are either such as ended in allowing the conveyance \*to stand, on account of something which prevented the application of the principle, while it was in general terms recognised ; or such as ended in setting aside the conveyance upon grounds wholly independent of the principle ; or such (and these are extremely few—two or three, at most) as applied the principle to setting aside the conveyance, but in circumstances of gross fraud, and even conspiracy. It might, perhaps, be affirmed that, excepting *Goddard v. Snow*, no case exists of a conveyance by the wife,

(1) 2 Br. C. C. 350.

(2) Mos. 177.

(3) 12 R. R. 233 (1 Ves. & B. 354).

(4) 25 R. R. 111 (1 Russ. 485).

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though without consideration, being set aside simply because made during a treaty of marriage, and without the knowledge of the intended husband. Yet it is certain that all the cases in which the subject is approached treat the principle as one of undoubted acceptance in this Court; and it must be held to be the rule of the Court, to be gathered from an uniform current of *dicta*, though resting upon a very slender foundation of actual decision touching the simple point. As, however, every thing depends upon the fraud supposed to be practised upon the husband, it is clearly essential to the application of the principle that the husband should, up to the moment of the marriage, have been kept in ignorance of the transaction. Furthermore, the cases would even seem to authorise us in taking all the circumstances of the parties into consideration; as the meritorious object of the conveyance, and the situation of the husband in point of pecuniary means. Thus, among the reasons for which the bill to set aside a settlement before marriage was dismissed, in *King v. Cotton* (1), one was that the husband was in mean circumstances—an Irish half-pay lieutenant, who received a considerable sum with the wife, and did not so much as pretend he could settle any jointure upon her. This and another case (2), arising \*out of the same facts, *Cotton v. King*, appear to have been much discussed. The settlement was before the treaty of marriage, but it was found to have been concealed from the husband; it rather appeared, indeed, that a statement of her fortune had been laid before him, in which the property conveyed was represented as still her own. The reasonableness of making some provision for her children while she remained sole was also insisted on by the Court in the case of *King v. Cotton*; and the same views had been taken in an older decision, *Hunt v. Matthews* (3), where, however, the husband's privity to the deed appears to have been admitted. In the case of *De Manneville v. Crompton* (4), to which I have already referred, the Court went much into the circumstances, and relied greatly upon the very natural arrangement and the fair course of the transaction between such near relatives as mother and daughter. Circum-

[ \*624 ]

(1) 2 P. Wms. 674.

(2) 2 P. Wms. 358.

(3) 1 Vern. 408.

(4) 12 R. B. 233 (1 Ves. &amp; B. 354).

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stances of this kind are certainly very material to rebut the inference of fraud upon which the doctrine rests ; and it is clear that there exist in the present case circumstances of a similar nature not undeserving of attention.

The provision was not, it is true, for children, as in some of the former instances, but it was for an only sister ; a sister, too, who had been deprived of the testatrix's bounty, the fund dealt with, by a marriage of which she disapproved, while the legatee herself, who had profited by her disappointment, was, at the time of the decease of the testatrix, about to form an alliance apparently not less displeasing to the same party.

[ \*625 ]

The husband, too, brought no accession to the matrimonial stock ; any settlement by him was out of the \*question ; and there can be no doubt whatever that the difference effected by the gift and assignment upon his intended wife's fortune would not, had it been clear beyond all dispute that he knew it, as I am disposed to think he did, have created the least hesitation on his part in prosecuting the match.

Upon these circumstances, however, and upon such as these, it is not necessary to dwell. They tend to shew that the present case is as free from all matter of aggravation, as the few in which the principle has been applied have been abundant in such matter. It is not even alleged in the bill that the husband was ignorant of the transaction ; indeed, it is not perfectly certain that the treaty was going on, and the marriage intended, at the date of the gift. On this last point, however, I place no reliance ; the one thing needful in a case of this kind is wanting ; the act does not appear clearly to have been done in fraud of the marital right about to vest in the intended husband, for the evidence is wholly defective in shewing that it was concealed from him : on the contrary, when the time that elapsed between the assignment and the marriage is considered, he being almost, during the whole of the interval, in constant intercourse with the lady and her family ; and when it is further considered that his near relatives, likewise upon the spot, were acquainted with the transaction, it is more likely that he should have known it than been ignorant of it. With the exception of *Goddard v. Snow*, indeed, there will not be found any direct authority for holding,

that the bare fact of the husband not knowing what had been done is enough without more, so that the transaction is fraudulent and void as against him, although nothing has been done to mislead him; and the authorities of BULLER, J., in one of the cases of *Lady Strathmore v. Bowes*, and of Lord \*ELDON, in *De Manneville v. Crompton*, are directly and strongly the other way. Yet, even in *Goddard v. Snow*, it is to be observed that the peculiar circumstance of the length of time which first the courtship, and then the coverture lasted, plainly shewed a wilful and continued suppression of the fact. He lived ten years with his wife, after courting her ten months, and only discovered it at her decease: although, therefore, he could not be said to have been deceived as to her fortune, inasmuch as he never knew either that she had the money, or had settled it; yet the inference is irresistible, from the length of time that she carefully concealed from him what she had done. This inquiry, however, is rendered unnecessary in the present instance; because, far from there being any proof of concealment or suppression of the truth, there is good reason to suppose, according to the probabilities of the case, that the husband was aware of what had passed. It is material to this important part of the case, that the bill does not charge concealment from Mr. St. George, nor even bare want of knowledge on his part. It is, therefore, clear upon all the points, that the decision below must be affirmed.

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[ \*626 ]

But it is said that Mr. Landor has not been allowed his costs by the decree; and no doubt, generally speaking, a party has a right to his costs, where fraud has been charged against him, and not proved. Nevertheless, when I consider that the great haste in which the whole transaction was begun and finished before Mr. St. George's arrival was the cause of all the suspicion which arose respecting it, although nothing whatever rests upon the conduct of Mr. Landor, yet, as it may justly be said that a few days' delay, without injury to any party, would have precluded all room for doubt, and prevented this suit, I cannot alter this part of the decree, but I give the costs of appeal.

1833.

*June 14.**Rolls Court.*  
LEACH, M.R.*July 19.*Lord  
BROUGHAM,  
L.C.

[ 627 ]

## STEPHENS v. JAMES.

(1 Myl. &amp; Keen, 627—633.)

The Court has authority to order maintenance for infants out of the jurisdiction, if the circumstances of the case require it; and where an infant had been taken by his father, who had absconded, without having surrendered to a commission of bankruptcy, to America, and the father would not suffer the infant to return to England, the Court, upon appeal, gave liberty to the guardian to apply annually for an allowance for the infant's maintenance and education in America, on condition of producing certificates, shewing the proper application of the money.

By a settlement dated the 14th of June, 1817, and made in contemplation of a marriage, which afterwards took effect, between John Stephens and Elizabeth Mary Green the younger, reciting that Elizabeth Bellamy, widow, deceased, had bequeathed all the rest and residue of her estate and effects to trustees upon trust to sell, and invest the produce of sale, and to pay the dividends arising therefrom to her daughter Elizabeth Mary Green the elder during her life, to her separate use; and after her decease upon trust to permit and suffer the testatrix's grand-daughter, the said Elizabeth Mary Green the younger, to receive the dividends to her separate use; and after her decease upon trust to apply such dividends to the maintenance of all or any the lawful children of the said Elizabeth Mary Green the younger during their respective minorities, and to pay and divide the capital among such children, when and as soon as they should respectively attain the age of twenty-one, share and share alike; and in case only one such child should live to attain the age of twenty-one, then the whole to such child, with limitations over in case no child should live to attain the age of twenty-one; and reciting that a sum of 12,000*l.* Navy 5 per cents., part of the residuary estate of the said Elizabeth Bellamy, was then standing in the name of the said trustees, it was witnessed that Joseph Green and the said Elizabeth Mary Green the elder, his then wife, gave and granted to the said trustees, their executors, &c., during the life of the said Elizabeth Mary Green the elder, an annuity of 300*l.* to be charged upon the dividends and interest of the said stock, upon trust, after the intended marriage, \*for the said Elizabeth Mary Green the younger for her life, to her separate use; and after her decease upon trust for the said

[ \*628 ]

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JAMES.

John Stephens for his life; and after the decease of the survivor of them, upon trust for the issue of the marriage. The settlement contained a proviso that if the said John Stephens should, during the lifetime of Elizabeth Green the elder, and of Elizabeth Mary Green, his intended wife, in any way charge or incumber the growing payments of the said annuity, or commit any act of bankruptcy, his life interest in the said annuity should cease and be for the benefit of the issue of the intended marriage.

Elizabeth Mary Stephens died in 1821, leaving her husband, and John Stephens the younger, the only issue of the marriage, surviving her. John Stephens, the father, charged the annuity of 900*l.*, in the lifetime of his wife, with the payment of several annuities; and in 1826 a commission of bankrupt was issued against him, and he was duly declared a bankrupt; but he absconded to America without having surrendered to the commission, taking with him the infant, who was then about eight years of age. A bill was filed by Elizabeth Mary Green, on behalf of the infant, praying that it might be declared that the life interest of John Stephens, the father, in the annuity of 900*l.* was forfeited, and that the infant had in consequence of such forfeiture become entitled thereto; and also praying for the appointment of a guardian, and the allowance of maintenance for the infant.

By an order dated the 12th of August, 1828, the Master's report, made in pursuance of the usual reference upon petition, whereby he approved of Elizabeth Mary Green the elder as a guardian, and of an allowance of 120*l.* per annum for the maintenance of the infant, to commence from the day of his arrival in England, was confirmed.

The father refused to allow the infant to return to England, and insisted upon funds being sent to America to defray the expenses of his education; and an arrangement having been made for transmitting funds for that purpose to a respectable mercantile house at New York, a petition, stating these circumstances, was presented to the Master of the Rolls; and an order, dated the 30th of November, 1830, was thereupon made by his Honour, referring it to the Master to inquire whether this arrangement would be for the benefit of the infant. Shortly

[ 629 ]

STEPHENS  
v.  
JAMES.

after the date of this order, Elizabeth Green, the grandmother of the infant, received a letter from the father, in which he described himself to be in destitute circumstances, and expressed his willingness to allow his son to return to England on receiving a sum of 178*l.* for the expenses of his outfit and voyage. This sum was transmitted to the father, who, instead of fulfilling his engagement, applied the money to his own use.

At the hearing of the cause before the Vice-Chancellor on the 8th of July, 1831, it was decreed that the life interest of John Stephens, the father, in the annuity, was forfeited, and that the infant had, upon such forfeiture, become entitled thereto; and the Master was directed to inquire what would be a proper allowance for the maintenance and education of the infant, regard being had to the circumstances of the father, and to the orders of the 12th of August, 1828, and the 30th of November, 1830. The Master found, by his report, that the sum of 178*l.* had been transmitted to America, and retained by the father in the manner above mentioned, and that an arrangement had been subsequently made by the guardian for placing the infant at the Miami College of Oxford, Ohio, under the care of a Professor M'Gaffy, for which purpose it was proposed to transmit an annual sum of 200*l.* to a respectable banker at New York, who \*undertook to see to the proper application of the money. The Master reported that, upon consideration of all the evidence that had been laid before him, this proposal was for the benefit of the infant, and ought to be carried into effect.

[ \*530 ]

The cause having come on for further directions upon this report, and it being proposed, as part of the minutes of the decree, that the sum of 200*l.* should be annually applied to the maintenance and education of the infant in the manner so approved by the Master,

The MASTER OF THE ROLLS refused to confirm this part of the Master's report; and directed that such sums as Elizabeth Mary Green, the plaintiff, had expended or rendered herself liable to, should be repaid to her; but that, in future, no part of the annuity of 300*l.* should be applied to the maintenance and education of the infant until his return to England, and that, until

such return, the dividends and interest of the said annuity should be invested, to accumulate for the benefit of the infant.

STEPHENS  
v.  
JAMES.

The plaintiff appealed against this order.

July 19.

*Mr. Tinney* and *Mr. B. Keen* for the plaintiff [cited *Logan v. Fairlie* (1) :

Reference was also made to a case of *Jackson v. Hankey*, which was heard in private by Lord ELDON, L. C., on several occasions in 1821, and of which Mr. Jacob (who was one of the counsel employed in the case) gives a note, without mentioning the names, in Jac. 264. In that case] a father, having been appointed to a situation in his Majesty's service which required him to reside abroad for several years, was allowed by the Court to take his infant children with him, upon undertaking to bring them back with him, if they should be living at the expiration of his period of service, and to transmit half-yearly vouchers to the Court shewing the mode in which their education was conducted. \* \* \*

[ 631 ]

THE LORD CHANCELLOR :

[ 632 ]

The only question in this case is that which involves the jurisdiction of the Court ; for, if the Court has the power to order maintenance for infants out of the jurisdiction, it will gladly avail itself of its authority to adopt a course which is obviously, under all the circumstances, most for the benefit of the infant. I am of opinion that the case of *Logan v. Fairlie* is a sufficient \*authority to establish the jurisdiction of the Court, and that the case before Lord Eldon affords a precedent for annexing such conditions to an order, made in behalf of an infant out of the jurisdiction, as will have the effect of keeping its property under the control of the Court.

[ \*633 ]

“ His Lordship doth order that the order made on the hearing of this cause for further directions, bearing date the 14th day of June, 1833, be varied. And it is ordered, that the plaintiff Elizabeth Mary Green, the guardian of the plaintiff John Stephens, be at liberty to apply to the Court at the end of each year, from

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v.  
JAMES.

the 15th day of February, 1833, for an allowance, not exceeding 200*l.* per annum, for the maintenance and education of the said plaintiff, the infant, at the Miami College of Oxford, Ohio, in the United States of America. And the said petitioner Elizabeth Mary Green is on every such application to produce proper certificates, vouchers, or other evidence of the plan of education of the said infant plaintiff actually adopted during the year then last past, and of the sums actually expended by the said plaintiff Elizabeth Mary Green in such maintenance and education of the said infant plaintiff during the said last-mentioned year, or for which she shall have rendered herself liable."

1833.  
June 11, 12.

*Rolls Court.*  
LEACH, M.R.

[ 643 ]

### RAWORTH v. MARRIOTT (1).

(1 Myl. & Keen, 643—646.)

Where an attorney who draws the will of the testator takes a benefit under it, the case is to be considered with peculiar jealousy, and the jury who try the validity of the will must be satisfied that the testator knew its contents; but their consideration need not to be confined to direct evidence, and they may find for the will upon circumstantial evidence only.

In this case a bill was filed by an heir-at-law, impeaching the validity of his ancestor's will, on the ground of fraud and imposition upon the alleged testator, and at the hearing of the cause the usual issue of *devisavit vel non* was directed.

Upon the trial of the issue a verdict was found in favour of the validity of the will, and a motion was now made for a new trial.

*Mr. Bickersteth* and *Mr. Lynch*, in support of the motion for a new trial.

*Mr. Pemberton*, *Mr. Hill*, *Mr. Jacob*, and *Mr. Richards*, *contra*.

The confidential attorney of the testator, who drew the will, was himself one of four residuary legatees under it, and had also a pecuniary legacy of 250*l.*, and the ground chiefly relied upon in support of the motion was, that where the attorney who draws

(1) *Fulton v. Andrew* (1875) L. R. 7 H. L. 448, 44 L. J. P. 17, 32 L. T. 209.

RAWORTH  
v.  
MARRIOTT.

a will takes a benefit under it, it is not to be presumed, as in other cases, that the testator, who executes the will, is acquainted with its contents, but that direct evidence must be given of that fact; that in this case there was no such direct evidence, and that the Judge, who tried the issue, ought to have stated to the jury that they could not, in the absence of positive evidence, infer the testator's knowledge of the contents of the instrument. In support of the proposition \*that, where the person who draws a will takes a benefit under it, there must be direct evidence of the testator's knowledge of the contents of the will, *Paske v. Ollat* (1), *Ingram v. Wyatt* (2), and *Barton v. Robins* (3), were cited. In *Paske v. Ollat* Sir JOHN NICHOL's words were: "The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely jealous of a circumstance of this nature. By the Roman law, *qui se scripsit hæredem* could take no benefit under a will. By the law of England this is not the case; but the law of England requires, in all instances of the sort, that the proof should be clear and decisive; the balance must not be left *in equilibrio*; the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper." In *Ingram v. Wyatt* (2), the same learned Judge said, "The cases shew how extremely jealous the law is to protect the unwary against undue influence and control. Where that relation of confidence (between client and attorney) exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. As in the case of an interested witness, it is not necessary to prove falsehood—a court of law will not hear him at all: so in the case of the person who draws the will, taking a benefit under it, it is not necessary to prove fraud and circumvention; he must remove the suspicion by clear and satisfactory proof."

[ \*644 ]

On the other side it was contended, that where a testator of sound and disposing mind executed a will, the law presumed that he was cognizant of the contents, and that that presumption

(1) 2 Phill. 325.

(3) 3 Phill. 455, n.

(2) 1 Hagg. 394.

RAWORTH  
 v.  
 MARRIOTT.  
 [ \*645 ]

was not rebutted by the circumstance \*of a benefit being given under the will to the person who drew it. In this case, an attempt had been made to impeach the soundness of the testator's mind ; but that attempt had failed, and the jury had, moreover, come to the conclusion, that no fraud or imposition had been practised upon the testator. There was no such inflexible rule as that supposed to have been laid down by the learned Judge of the Ecclesiastical Court, nor was such a rule consistent with the general principles of the law of evidence. Unless the presumption of law were rebutted by circumstances sufficient to satisfy the jury, that the testator was ignorant of the contents of the will which he executed, that presumption must prevail ; and it would be most dangerous to hold, that the jury were bound to form their conclusions, not upon the general merits of the case as brought in evidence before them, but upon some particular species of testimony. It was also insisted, that the point relied upon as a ground for further investigation before a jury should have been raised by the pleadings, and that, as it had not been so raised, the defendants were entitled to have the motion dismissed with costs.

*June 12.*

#### THE MASTER OF THE ROLLS :

An attorney, who has a prudent regard for his own character, will desire to avoid drawing a will under which he is to take a considerable benefit. He may be placed in circumstances in which he cannot well avoid being the drawer of such a will, and in that case the same prudent regard for his character will induce him to provide direct and clear evidence of the intention of the testator to make the gift in his favour. If he fails in that precaution he must expect that the transaction will be viewed with

[ \*646 ]

extreme jealousy ; and it will be \*the duty of the Judge who tries the validity of such a will to call the particular attention of the jury to the special circumstances, and to state to them that they must be satisfied that the testator knew the contents of the will ; but it will not be the duty of the Judge to state to the jury that they must come to that conclusion upon direct evidence only, and that they must exclude from their consideration all circumstantial evidence. Upon examination of the case

of *Paske v. Ollat*, it does not appear to me that the learned Judge who decided that case entertained the opinion which is imputed to him; and, having had an opportunity of seeing that learned Judge, I have learned from him that it was not his intention, in that judgment, to express such an opinion.

Upon the whole, it appears to me that the learned Judge before whom this issue was tried fully discharged his duty in his summing up to the jury. It was for them to determine whether, under the special circumstances of this case, it was to be considered that the testator well knew the contents of the will. They have come to the conclusion that the testator did know such contents; and the learned Judge has expressed himself in his report to be fully satisfied with that conclusion. I am equally satisfied with it; and I must, therefore, refuse this application for a new trial: and, as it is grounded upon a view of the case which was not brought forward in the pleadings, I

*Refuse it with costs.*

### PARR v. PARR.

(1 Myl. & Keen, 647—648; S. C. 2 L. J. (N. S.) Ch. 167.)

A testator directed his property to be settled upon his daughter Harriet in such manner that in case of her death it should devolve upon her children, if she had any; and if she should not have any, then that she should bequeath it to any person she might think fit: the word “devolve” imports transmission to children living at the death of the mother; and upon the death of the mother, her husband, as representative of a deceased child, took no interest under the will.

WILLIAM ELLIOT, by his will dated in March, 1808, directed that his wife should receive the interest of whatever money he might die possessed of during her life; and, after her decease, he directed the capital to be settled on his daughter Harriet in such manner that, in case of her death, it should devolve upon her children if she should have any, and if she should not have any, then that she should bequeath it to any person she might think fit. The testator died in 1817. His daughter Harriet married the plaintiff Parr in 1811, and had a child, Mary Ann, who died in 1821; and in 1819 she had a second child, Charlotte: Harriet Parr died in 1827. The question was, whether the

RAWORTH  
v.  
MARRIOTT.

1833.  
June 4.

*Rolls Court*  
LEACH, M.R.

[ 647 ]

PARR  
v.  
PARR.

plaintiff, as representative of the deceased child, took any interest under the will.

*Mr. Beames*, for the plaintiff, contended, that the general rule of law was that, where there was a gift of the interest of personal property to a person for life, with a direction, after the decease of such person, to pay the principal to his children, all the children took an immediate vested interest as tenants in common. The cases in which it had been held that the gift of the principal did not vest until the death of the tenant for life turned upon circumstances not applicable to the present case. With respect to the word “devolve,” it meant no more than that the property should go, upon the death of the mother, to all the children equally.

*Mr. Stinton*, *contrà*.

[ 648 ]

THE MASTER OF THE ROLLS :

The intention of the testator is perfectly clear; and there is no rule of law which prevents the will from receiving that construction which the language of the testator naturally imports. He directs the property to be so settled upon his daughter, that, in case of her death, her fortune should devolve upon her children, if she should have any. Any at what time? At her death. To “devolve” means to pass from a person dying to a person living; the etymology of the word shews its meaning. It was to devolve upon her children if she should have any at her death; and if she should not have any, it was to go to any person to whom she might think proper to bequeath it.

1832.  
June 29.  
July 2, 23.

*Rolls Court.*  
LEACH, M.R.  
[ 649 ]

## PHILLIPS v. PHILLIPS.

(1 Myl. & Keen, 649—664.)

Real estate purchased with partnership capital for the purposes of the joint trade is personal estate, and, in respect of the share of a deceased partner, retains that character as between his real and personal representatives (1).

[ONE question in this cause was, whether a lapsed share of residue comprising real estate by will directed to be sold and to

(1) See now the Partnership Act, 70 L. T. 265, and the cases there 1890, ss. 20—22, and see *Davis v. Davis*, '94, 1 Ch. 393, 63 L. J. Ch. 219, cited.—O. A. S.

be deemed to be part of the testator's personal estate, so far as it was constituted of the produce of real estate, belonged to the co-heiresses or to the next of kin of the testator (1).]

PHILLIPS  
v.  
PHILLIPS.

[ 651 ]

The testator [John Phillips] carried on the business of a brewer, in partnership with a relation, also named John Phillips, no articles of partnership having been entered into or drawn up between them; and in the course of their business, after the date of the will, they purchased with partnership monies certain freehold and copyhold public houses for the purposes of their trade, which were conveyed and surrendered to the two partners and their heirs: and another question in the cause was, whether the interest of the testator in these public houses was to be considered as a part of his general personal estate, or only personal estate so far as it was required for the discharge of the debts and engagements of the trade. \* \* \*

On the second point, *Mr. Bickersteth* and *Mr. Williamson*, for the co-heiresses. \* \* \*

[ 653 ]

*Mr. Pemberton*, *Mr. Tinney*, *Mr. Rolfe*, and *Mr. Metcalfe*, on the other side [relied chiefly on *Townsend v. Devaynes* (2).] In that case freehold and copyhold premises, consisting in part of paper-mills, were purchased with part of the partnership capital, and held for the use of the partnership, and, upon the death of one of the partners, his executors agreed to sell his share to \*Devaynes, a surviving partner, for 4,700*l.* A suit was instituted by the executors against Devaynes and the heir-at-law, for a specific performance of that agreement, and upon a reference to the Master to inquire how much, if any, of the 4,700*l.* arose from such part of the premises as was personal estate, the Master reported that 1,300*l.*, part of the 4,700*l.*, arose out of personal estate. An exception was taken to that report, on the ground that the Master ought to have certified that the whole of the

[ 655 ]

[ \*656 ]

(1) The MASTER OF THE ROLLS decided this question in favour of the next of kin, but his decision was subsequently overruled by Lord CRANWORTH, L. C. in *Taylor v. Taylor* (1853) 3 De G. M. & G. 190, 22 L. J. Ch. 742, and the present report of

*Phillips v. Phillips* is consequently confined to the point stated in the head-note.—O. A. S.

(2) Referred to in Lindley on Partnership, and now covered by the Partnership Act, 1890, s. 22.—O. A. S.

PHILLIPS 4,700*l.* arose from personal estate ; and Lord ELDON allowed the  
 v.  
 PHILLIPS. exception. That decision settled the general question as to the absolute conversion into personalty of real estate purchased for partnership purposes, without reference to contract between the partners ; for, although it was alleged that there had been an agreement between the partners that the surviving partners should have the option of purchasing the shares of deceased partners, the Master expressly found that no agreement for a sale, which was binding upon the heir-at-law, had been entered into by the testator. It might now be considered as settled, therefore, that the equitable interest in real property, purchased with partnership capital for partnership purposes, was, upon the decease of a partner, distributable as such partner's personal estate.

[ 657 ]      *Mr. Bickersteth*, in reply, observed that \* \* it was clear, at any rate, that Lord ELDON did not consider that the general question was disposed of by *Townsend v. Devaynes* ; for, in *Crawshay v. Maule* (1), which occurred six years afterwards, that learned Judge treated the point as still unsettled. In speaking of freehold estate purchased by a partnership for partnership purposes, his Lordship there said that " a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock—personal estate in enjoyment, though freehold in nature and quality."

\* \* \* \* \*

THE MASTER OF THE ROLLS [upon this question said :]

[ 663 ]      With respect to the second question,—whether the freehold and copyhold property purchased with the partnership capital, and conveyed to the two partners and their heirs for the purposes of the partnership trade, is to be considered as personal estate only for the payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of a deceased partner,—I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the

(1) 18 R. R. at p. 135 (1 Swanst. 521).

partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate: and in the case of *Fereday v. Wightwick* (1), I had no intention to confine the principle to the payment of the partnership demands. Lord ELDON has certainly, upon several occasions, expressed such an opinion: the case of *Townsend v. Devaynes* (2) is a clear decision to that effect; and general convenience requires that this principle should be adhered to. \* \* \*

PHILLIPS  
v.  
PHILLIPS.

### BURRELL v. NICHOLSON.

(1 Myl. & Keen, 680—682.)

Upon a bill of discovery in aid of an action to try whether the plaintiff's house was within the limits of a certain parish, and therefore liable to the parochial rates; the Court ordered the defendants, the parish officers, to produce for his inspection the rate-books, account-books, minute-books, orders, and other documents, which related to the matter in question, and were admitted by their answer to be in their possession.

1833.  
Aug. 15.  
—  
Lord  
BROUGHAM,  
L.C.  
[ 680 ]

THE bill was filed for discovery in aid of the plaintiff's case upon an action at law, which was brought for the purpose of determining the question whether he was a resident householder within the parish of St. Margaret, Westminster, and liable, as such, to parochial rates. The defendants were the parish officers and the vestry clerk of St. Margaret's.

*Sir E. Sugden* and *Mr. Kindersley* moved that certain books and papers relating to the matters in question in the cause, and which one of the defendants, *Stephenson*, the vestry clerk, by his answer, admitted to be in his custody and possession, might be produced for the inspection of the plaintiff.

The *Attorney-General*, *Mr. Pepys*, *Mr. Treslove*, and *Mr. Parker*, for different defendants, opposed the motion.

#### THE LORD CHANCELLOR :

This was a motion by the plaintiff for the production of books and papers admitted to be in the hands of one of the defendants. An action of trespass is pending at law, which has for its object

(1) 32 R. B. 136 (1 Russ. & My. 45).

(2) See *ante*, p. 411.

BURRELL  
v.  
NICHOLSON.

to determine whether or not Richmond Terrace and Privy Gardens are within the parish of St. Margaret, Westminster; a distress having been made by the parish upon the goods of the plaintiff, as occupier of a house in the disputed district, and the action thereupon brought by him to try that question.

[ 681 ]

Stephenson, the defendant against whom the present motion was made, is the vestry clerk of the parish.

The bill charges that the defendant Stephenson has in his possession divers maps, plans, and surveys of the parish and of the *locus in quo*, and also divers rate-books and other books of accounts, pleadings, cases and statements for counsel's opinion, orders for removal, relief, and burial of paupers, receipts, documents, and papers relating to the matters in the bill (that is, the matters in question at law); and that, if these were produced, the truth of the plaintiff's case would appear.

The defendant, by his answer, denies having certain of the kinds of documents charged, such as maps, plans, and surveys, pleadings and cases, &c.; but he admits having others, as rate-books, minute-books, account-books, and orders, and he sets forth the particulars in a schedule which occupies fourteen or fifteen folios, and he refers to a mass of books and papers by date and title, and also to chests of other documents, so that the bare inspection of the whole would be a work of much time and labour. But he does not deny that these documents contain matters connected with the plaintiff's right, and by which that right would be made to appear.

I am of opinion that the production of these papers and books comes within the rule under which they are sought to be produced. The question is one of boundary, and these documents contain the evidence common to both parties—the evidence of the title of both. They cannot be said to stand in the same predicament with the documents which in *Bolton v. The Corporation of Liverpool* were refused by the VICE-CHANCELLOR, and afterwards, \*in February, 1833, by this Court (1), affirming his Honour's order; and although, at first, I was inclined to doubt whether they did not come within the principles there laid down; yet, upon further consideration, I think they do

[ \*682 ]

(1) Page 251, *supra*.

not, but must be taken, upon the statement undenied on the pleadings, to be evidence common to both parties.

BURRELL  
v.  
NICHOLSON.

It would be a grievous thing if, in such a case as this, the question at law were tried with only the feeble aid given to the party and the Court by a *subpœna duces tecum*, the Court having no power to order a previous inspection of papers which are voluminous enough to fill a room.

As I entertained some doubt how far this case clashed with the former, wherein I agreed with the VICE-CHANCELLOR, I deemed it a respect due to his Honour that I should communicate with him upon the subject; and, after examining the pleadings, he has arrived at the conclusion to which I had come, and, indeed, considers that there is no doubt at all of the plaintiff's right to the production.

### LYDE v. MYNN (1).

(1 Myl. & Keen, 683—696; S. C. Coop. temp. Brough. 128.)

1833.  
July 19.  
Aug. 3.

Lord  
BROUGHAM  
L.C.  
[ 683 ]

Under the law of bankruptcy in force in 1826, a claim founded on a covenant to charge a particular debt upon a specific fund, in which the covenantor had no present interest, but merely an expectancy, was not barred by the bankruptcy and certificate of the covenantor, before he acquired an actual interest in the fund.

IN the month of December, 1824, the defendant John Mynn, in consideration of the sum of 1,110*l.*, granted to the plaintiff

(1) *Robinson v. Ommanney* (1883) 23 Ch. D. 285, 52 L. J. Ch. 440, 49 L. T. 19.

[*Note*.—In the case of *Thompson v. Cohen* (1872) L. R. 7 Q. B. 527, 41 L. J. Q. B. 221, 26 L. T. 693, this case was distinguished on the ground that the covenant to secure the debt (an annuity) was not provable under the bankruptcy, and was therefore possibly not extinguished by the extinction of the debt. It is, however, clear that such a covenant would be capable of proof under the modern law of bankruptcy, and would therefore be discharged: *Collyer v. Isaacs* (1881) 19 Ch. D. 342, 51 L. J. Ch. 14, 45 L. T. 567. Sub-

sequent cases have so fully settled the operation and effect of covenants relating to expectant interests that it is thought unnecessary to retain a full report of the case of *Lyde v. Mynn*, which turned upon a state of law now obsolete, and which was decided at a time when the operation of such covenants had not been quite determined. See now *In re Clarke* (1887) 36 Ch. Div. 348, 56 L. J. Ch. 981, 57 L. T. 823; *Tailby v. Official Receiver* (1888) 13 App. Ca. 523, 58 L. J. Q. B. 75, 60 L. T. 162, H. L.; *In re Turcan* (1888) 40 Ch. Div. 5, 58 L. J. Ch. 101, 59 L. T. 712—O. A. S.]

LYDE  
v.  
MYNN.

Lyde for his life an annuity of 160*l.*, and covenanted duly to pay the same; and, as an additional security for the payment thereof, he further covenanted to charge this annuity upon all such property as he, Mynn, should, in the event of his wife's decease, become entitled to by virtue of her last will and testament, or otherwise.

In execution of a power reserved by her marriage settlement, Mrs. Mynn made a will, dated the 26th of November, 1826, whereby she gave her property to trustees, upon trust to purchase an annuity of 700*l.*, and pay the same to the defendant, her husband, half-yearly during his life.

On the 18th of December, 1826, a commission of bankrupt issued against John Mynn, under which he was declared a bankrupt; and on the 19th of March, 1827, he obtained his certificate. Mr. Lyde never applied to prove under the commission in respect of his annuity.

[ \*684 ] On the 11th of June, 1827, Mrs. Mynn died; and the trustees having subsequently purchased the annuity of 700*l.* for her husband, in pursuance of the directions in \*her will, this bill was filed against Mynn and the trustees, praying that the defendants might be decreed to join in charging the annuity of 700*l.* with the payment of the plaintiff's annuity in future, as well as of the arrears then due.

The VICE-CHANCELLOR made a decree according to the prayer of the bill (1), and against that decree the present appeal was brought.

*Mr. Pepys, Mr. Tinney, and Mr. Parker, for the plaintiff.*

*Sir E. Sugden and Mr. Wakefield, for the defendant Mynn, who appealed [cited Harwood v. Tooke (2), and other cases:]*

[ 689 ] The present experiment will, if it succeeds, suggest a simple and effectual expedient, by which creditors may always evade the consequences of their debtor's bankruptcy. They have only to take from him, by way of further security for their debts, a covenant to charge all such property as he may at any time thereafter acquire. \* \* \*

(1) 4 Sim. 505.

(2) 29 R. R. 81 (2 Sim. 192).

*Mr. Pepys*, in reply [cited *Wethered v. Wethered* (1), and other cases] :

LYDE  
v.  
MYNN.  
[ 691 ]

The Bankrupt Act only provides for personal obligations, and so far as this covenant is personal, undoubtedly the bankruptcy has destroyed it. But here there were two distinct and independent covenants ; the one (which is gone) to pay the annuity ; the other, to secure the annuity by a charge upon the property expected from the wife. The latter created an obligation which bound the conscience of the covenantor with reference to a specific fund not actually existing at the time, but expected soon to come *in esse*. That obligation remains in full force, notwithstanding the failure of the other covenant ; and the instant the expectations are realised, the equity attaches. \* \* \*

THE LORD CHANCELLOR, after stating the case, delivered judgment as follows :

Aug. 3.

That the claim to the annuity is barred by the Bankrupt Act, cannot be denied ; for the annuity was an interest of which the value was capable of calculation, and for which proof might have been made under the commission. But the covenant to secure that annuity gave the annuitant a right which could not in any way be made the subject either of calculation or of proof ; and it seems impossible to understand how such a right could be barred. Consider the nature of the interest which the covenantor had, which alone at the execution of the covenant he could pass, and which, therefore, must be the measure of the covenantee's proof under the commission ; and it will appear that all proof was out of the question in such a matter, and that, consequently, there was nothing upon which the discharging power of the certificate, with its co-relative, the power of proving, could operate.

[ 692 ]

At the execution of the covenant, the bankrupt's wife was alive ; and the only interest which the bankrupt possessed, and over which he covenanted to give a security, was the possibility of benefits which she might choose to leave him by her will. He bound himself, in case he should eventually take any thing under that will, to give his creditor a security over it. It is

(1) 29 B. R. 77 (2 Sim. 183).

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[ \*693 ]

impossible to treat this covenant as a contingent debt—it is, in truth, no debt at all; it is a mere personal obligation to do a certain thing in a most uncertain event. If the covenantee attempted to prove in respect of it, how was it possible for the commissioners to ascertain the value thereof, and admit him to prove the amount so ascertained, as the fifty-sixth section of the Bankrupt Act directs? But it is plainly not at all like a debt payable upon a contingency, which forms the subject of that section. The Court of \*King's Bench, in *Taylor v. Young* (1), held it too clear to admit of argument, that no value could be put upon a covenant to perform covenants; and that the covenantor's bankruptcy, therefore, could not be pleaded in bar to an action upon such a covenant. But the difficulty of valuing such a covenant as the one now before the Court would be infinitely greater.

Another point, however, is made. The covenant itself is contended to be void, on the ground of its relating to a mere expectancy; and the cases of *Beckley v. Newland* and *Hobson v. Trevor* (2), in Lord MACCLESFIELD's time, are said to have been shaken by later cases, and particularly by *Harwood v. Tooke*. But, so far is this from being correct, that on the contrary, some of those later cases recognise the authority of the older ones, and carry the principles there admitted somewhat further, while none of them, when duly considered, indicate the least departure from them.

In *Wethered v. Wethered* (3), besides the agreement to share expectancies, there occurred the additional circumstance of the relation in which the contracting parties stood to the party from whom the property, the subject-matter of agreement, was to be derived, and the consequent argument founded on the impolicy of favouring arrangements in derogation of the parental authority. The agreement of the parties there was to share equally between them whatever of the real or personal estates of their father might come to them at his decease, by devise, descent, or otherwise; and also whatever he might advance to them in any way during his life. But the VICE-CHANCELLOR,

(1) 3 B. & Ald. 521.

(2) 2 P. Wms. 182, 191.

(3) 29 R. R. 77 (2 Sim. 183).

after considering \*the cases, and denying that *Beckley v. Newland* had been overruled by *Harwood v. Tooke*, which he considered rather to uphold it, decreed a specific performance of the agreement. And throughout the argument, the whole stress was laid, not upon the transaction being a dealing with expectancies, but only upon the relationship of the parties so dealing to the individual from whom the expectation was entertained.

LYDE  
v.  
MYNN.  
[ \*694 ]

[After commenting upon the earlier cases, his Lordship concluded that the validity of the covenant was beyond dispute, and he continued as follows:]

Upon the second point made, I am therefore of opinion that the argument against the plaintiff's right fails entirely.

[ 695 ]

One circumstance in this case, which has led me to reconsider it with more anxiety than might otherwise have been requisite is, that as the debt to secure which the covenant was given—that is, the annuity—was capable of valuation, it may be said there was a discharge of the debt itself by the certificate, and that therefore the security for the debt must also be gone. But that result by no means follows. The one liability was provable—it was a debt; the other was a personal obligation to do an act in a certain event which did not \*happen till after the bankruptcy and certificate, and which might never have happened at all; it was no debt, though it related to a debt.

[ \*696 ]

In every view of the case, I think the judgment below right; and the appeal must be

*Dismissed with costs.*

## LAPHAM v. PIKE.

(1 L. J. (N. S.) Ch. 10—12.)

Vendor and purchaser—Presumption of title.

1831.  
Dec.

A purchaser may be required to presume any fact which a Judge at Nisi Prius would direct a jury to presume.

LEACH, M.R.  
[ 10 ]

THIS was a bill for specific performance of a contract for sale of a freehold messuage, &c. It had been referred to the Master, to ascertain whether a good title could be made, and he had reported in the affirmative. The defendant excepted to his report upon several grounds, but it is only necessary to mention the following circumstances.

LAPHAM  
v.  
PIKE.

By indentures of lease and release, dated 9th and 10th of January, 1745, being a settlement made after the marriage of George Perry, then late of Warminster, but then of Bath, gent., with Elizabeth, his wife, the premises in question were settled to the use of George Perry, for ninety-nine years, if he should so long live; remainder to his wife for life; remainder to first and other sons of the said Perry and wife in tail male; remainder to their daughters, as tenants in common in tail, with remainder to the said George Perry, in fee.

The next document in the title was an indenture dated the 24th of March, 1756, made between Elizabeth Perry, of Bristol, widow and relict of George Perry, theretofore of Warminster, and then late of Bath, gent. deceased, of the first part; Samuel Whyting, of Bristol, and Mary his wife, who was the only surviving daughter of the said George Perry, on the body of the said Elizabeth his wife lawfully begotten, of the second part; and trustees of the third part; whereby, for barring estates tail in the premises, and settling the same, the said Elizabeth Perry, and Whyting and wife, covenanted to levy a fine (which was accordingly levied,) to enure to the said Elizabeth Perry for life; remainder to Whyting for ninety-nine years, if he should so long live; remainder to the said Mary his wife for life; remainder to trustees for one thousand years, to raise portions for their younger children; remainder to the issue of Whyting and wife in strict settlement; remainder to such use as the said Mary Whyting should appoint; remainder to the issue of the said Mary Whyting, in tail general, with ultimate remainder to the said Elizabeth Perry, in fee.

It no otherwise appeared in the title, than the presumption which these deeds might afford, whether or not George Perry had any other heir than Mary Whyting; nor did it appear whether or not he died intestate.

[ \*11 ]

The plaintiff, grounding his title to the \*fee by derivation from the deed and fine of 1756, the defendant required it to be shewn that George Perry did not devise away the reversion, and that he had not any other heir than Mary Whyting. The plaintiff, thereupon, searched from 1745 to 1756 inclusive, for the register of the burial of George Perry, at Warminster, at Bath, and at

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Bristol, in which places, it appeared by the deeds, George Perry had, from time to time, been domiciled, but without success ; he also searched, unsuccessfully, for a will or letters of administration in the several ecclesiastical jurisdictions, provincial and prerogative, which comprised those localities ; and he also made enquiries, equally unsuccessful, of the only one of Perry's descendants who was known, to elicit a clue for further search, and to ascertain whether or not Perry had been married prior to his marriage with the said Elizabeth, and if so, whether he had any issue by such former marriage. These searches and enquiries were adduced before the Master, by the plaintiff, the vendor, as reasonably sufficient to satisfy the scruple of the defendant ; while the latter grounded that part of his exceptions on their insufficiency to cure the alleged defect of title.

*Mr. Jacob*, for the defendant, the excipient :

The reversion may be outstanding, it being devisable or descendible by or from G. Perry ; for the fine in 1756 only barred the issue of Mary Whyting ; upon failure of which, at any time, the base fee thereby created would determine, and the reversioner would come into possession. The settlers of 1756 ought to have suffered a recovery. Consequently, it was incumbent upon the vendor to shew that G. Perry had no heir general but Mary Whyting, and also that he died intestate. The searches made go for nothing, as they do not obviate these doubts. \* \* No limitation of time operates in favour of the title, for the present possession is derived under the limitation in tail ; and, until after failure of the issue, there could not be a holding adverse to the reversioner. \* \* \*

*Mr. Preston* and *Mr. Campbell*, for the plaintiff :

\* \* We contend that the designation of Mary Whyting in the deed of 1756 is *primâ facie* evidence that she was the general heir ; and that, at this distance of time, as regards the balance of presumptions, it ought to be presumed that she was so, and inherited the reversion, as such, rather than that her father had been previously married and had an elder heir.

[ 12 ]

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v.  
PIKE.

THE MASTER OF THE ROLLS :

I think the objection is not a valid one. I am bound to presume to the same extent as I should, were I sitting as a Judge at *nisi prius*, be bound to direct a jury. [After stating the circumstances, his Honour proceeded:] If the daughter did not represent her father as owner of the reversion, she had power to destroy that reversion: yet, in making the settlement in 1756, the parties dealt with the property as if she had that reversion. It is impossible to presume that she did not know her title: yet she levied a fine, when she ought to have destroyed the reversion, if she was not entitled to it. I am bound to presume, that, as she did not destroy it, she was herself the heir-at-law, and entitled to it. She must have known if she was not, and she would have destroyed it, if in any other person. I decide this case upon that point alone: but for that, I should have felt great doubt.

*Decree specific performance; with costs (his Honour considering that the plaintiff had used reasonable endeavours to clear up objections which could not be deemed frivolous).*

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TAPSTER v. PLACE (1).

(1 L. J. (N. S.) Ch. 19—21.)

1831.  
Nov. 17.

LEACH, M.R.  
[ 19 ]

Trust for creditors.

Assignment, in March, 1821, of certain property for benefit of creditors who should execute, (without limiting a time). The attorney who prepared the deed and solicited signatures, was a creditor. The assignor died insolvent. The deed was taken out of his hands by a trustee in December, 1822, and he never executed, nor applied to do so; but when the property was divisible in 1830, he claimed a benefit under the deed, as having acquiesced under it: Held inadmissible; he not having done any unequivocal act of acquiescence, binding him to the terms of it.

By an assignment, dated the 19th of March, 1821, made between James Simmons, first part; Francis Place and George Neame, two of the creditors of the said James Simmons, second part; and the several other persons whose names were thereunto subscribed and seals affixed, also creditors of the said

(1) Not cited in *Baber's Trusts* (1870) L. R. 10 Eq. 554, 40 L. J. Ch. 144.—O. A. S.

TAPSTER  
v.  
PLACE.

James Simmons, third part; after stating that Simmons stood indebted to the persons parties thereto of the second and third parts, in the sums specified in the schedule thereunder written, and therein set opposite to their respective names, it was witnessed that the said Simmons assigned his interest in certain sums of money and Consolidated Bank Annuities to Place and Neame, their executors, &c., upon trust (after payment of expenses) to pay the several debts due to the said Place and Neame and the several other persons parties thereto of the third part, and which were specified in the schedule thereunder written, with interest, by an equal pound rate *pari passu*, and without preference; the same to be accepted in lieu and full satisfaction and discharge of the whole of the same debts respectively; and, if there should be any residue after answering the several purposes aforesaid, upon trust to pay the same to the said Simmons, his executors, &c. In consideration of which provision so made by Simmons for his creditors, executing the said indenture as aforesaid, the said several creditors parties thereto respectively covenanted with Simmons, that they would accept of the said provision for payment of their respective debts, and would not at any time thereafter sue at law or in equity against the said Simmons, his heirs, executors, &c. for their respective debts or any part thereof, and would execute releases, &c.

There was no schedule to the deed, other than what was constituted by the signatures of the creditors and the setting down of their debts opposite to their names.

Soon after the execution of the assignment, Simmons died insolvent.

Many of the creditors executed the deed, but there were many who did not, and amongst the latter a Mr. Pierce, who had acted as the solicitor of Simmons, and was a creditor for a considerable sum. He also prepared the assignment, and procured signatures of creditors thereto. The property assigned was not available for distribution till 1830. When it became so, the trustees were called upon by the creditors who had executed, to share it amongst them, *pari passu*, (it being insufficient to pay in full); but the trustees having doubts whether the

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v.  
PLACE.

creditors who had not executed were not entitled to participate, and one of them, namely, Mr. Pierce, making such claim, the trustees declined to distribute the assets without the direction of a court of equity. The plaintiff, a creditor who had executed, thereupon filed this bill on behalf of himself and the other creditors who had also executed, against the trustees and against Mr. Pierce. The bill charged, and the answers admitted, that the creditors of each class were so numerous that it would not be practicable to prosecute the suit if they were all to be made parties thereto. The defendant Pierce stated by his answer, that Simmons was considerably indebted to him for business done; that he had the possession of the assignment as the solicitor of Simmons, and continued to conduct his affairs until the 6th of December, 1822, when he was requested by one of the trustees to deliver up to him the trust deed and the various accounts of the creditors; and that he did so, and expected that it would have been returned to him to have completed the signatures thereto, but it never was returned to him, nor was even tendered to him for his signature as a creditor; \*that he had not refused to execute, but had always been ready and willing to do so, and to come into any measure that would prove beneficial to the creditors and to the estate of Simmons generally.

[ \*20 ]

*Mr. Pemberton and Mr. Sharp, for the plaintiff:*

\* \* No time was specified within which creditors were to come in: it therefore must be referred to a reasonable time. The creditors who have not executed the deed have not subjected themselves to the terms of it, but have lain by during an unreasonable period, and long after the death of the assignor: during which Simmons and his general estate have not had the benefit of being quieted in respect of their demands according to the terms of the deed. \* \* \*

*Mr. Bickersteth (for the defendant Pierce):*

\* \* Here, the defendant Pierce was the attorney who prepared the deed and solicited the signatures of the creditors. His doing so, shewed such an acquiescence on his part, that if

he had sued, or sought to exercise, in respect of his demand, any other legal right inconsistent with the purport of that deed, he would not have been permitted to go on. Such a principle ought to be reciprocal, or to have no existence at all: *Spottiswood v. Stockdale* (1). \* \* \*

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r.  
PLACE.

Counsel appeared for the trustees, and submitted to act as the Court should direct.

#### THE MASTER OF THE ROLLS :

The defendant Pierce does not appear to have done more than act as an attorney in respect of this arrangement; and, in the course of that, it does not appear that he did any act of acquiescence in respect of his own debt. The deed remained in his possession, even after the death of Simmons: and though he had that opportunity, he did not execute it. He can only claim under that deed upon a principle of contract; and, unless he has done some unequivocal act binding upon him, as adopting that contract, he cannot be considered as coming within the benefit of it. A person's acts are to be taken the strongest against himself. His being the attorney, and not executing the deed, but suffering \*it to go out of his hands unexecuted, looks rather like lying by, than the conduct of a person who intends to be bound. I admit the rule laid down by Lord ELDON in *Spottiswood v. Stockdale*; but this defendant Pierce has not brought himself within the benefit of it.

[ \*21 ]

#### BLACKWELL v. WOOD.

(1 L. J. (N. S.) Ch. 35—42.)

##### Settlement—Consent to marriage.

A settlement by A. of stock, to himself for life; remainder, in case his natural daughter married with his consent, under hand and seal and attested, to her absolutely; but if not, then to her separate use for life, with remainder to her children. The daughter went out to India, and was married there very soon after, without any formal consent appearing to have been given. A. however, received and always treated the

1831.  
Nov. 22.

LEACH, M.R.

[ 35 ]

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v.  
WOOD.

husband with the greatest cordiality as his son-in-law: Held, that a formal consent to the marriage was not necessary, and that a substantial consent was to be presumed from the behaviour of A. towards his son-in-law and daughter.

[ \*36 ]

THE bill alleged that, by indenture, dated the 20th September, 1797, between Mark Wood, Esq. (afterwards Sir Mark Wood, bart.) of the one part, and J. C. Smyth and Henry Bell, of the other part,—after stating that Mark Wood had transferred into the joint names of Smyth and Bell, 3,375*l.* Bank five \*per cent. Annuities, and, for providing a suitable fortune for his reputed natural daughter, (the plaintiff,) then Maria Wood, spinster (the daughter of a native of the East Indies), and her children, was desirous that said stock should be settled as thereafter mentioned;—in consideration of the love and affection, &c., it was covenanted, &c., that Smyth and Bell, and the survivor, &c., with the consent, direction, and approbation of Mark Wood, during his life, and, after his decease, then, at their or his own discretion, might sell said stock and invest the monies in other stock or upon mortgage; upon trust to pay the income to Mark Wood for life; and in case Maria Wood should at any time during the life of Mark Wood happen to marry with his consent and approbation, to be testified by some writing or writings under his hand and seal, in the presence of, and to be attested by two or more credible witnesses, but not otherwise, that then Smyth and Bell, and the survivor, &c., after the decease of Mark Wood, and in the meantime subject to his life-interest therein, should stand possessed of said sum in trust for Maria Wood, and for her executors, administrators, and assigns; but in case she should marry without such consent, to be testified as aforesaid, then upon trust, after the decease of Mark Wood, from time to time to pay the said interest, dividends, and proceeds, unto her for her life, for her sole use and benefit, independent of any husband with whom, without such consent, she might marry; and, after her decease, then in trust to stand possessed of said sum, in trust for all and every the child and children of Maria as therein mentioned; \* \* that, soon after the settlement, the plaintiff, then Maria Wood, about the age of eighteen years, was sent out by her father to India to his brother, Colonel Thomas Wood, to whom he com-

mitted her entire charge and guardianship, and she resided in his family; during which she became acquainted with Major James Blackwell, a gentleman of good family, and high respectability, who made proposals of marriage to her, which she with the full approbation of said Thomas Wood, and his relations and connexions then in India, and also with the consent of her father, accepted: and, accordingly, about the latter end of 1798, she intermarried with Major Blackwell;—that, in 1799, Sir Mark Wood prevailed upon Smyth and Bell, the trustees, to sell out the stock and pay over the proceeds to him; and, thereupon, he delivered to Bell a letter, dated the 26th of November, 1799, one passage of which was as follows:

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 &  
 WOOD.

“Inclosed is the account sale of my daughter’s stock, amounting to 3,375*l.* new 5 per cents., which produced 3,049*l.* 4*s.* 1*d.*, and the amount of which I have sent a promissory note promising to be answerable for; so that, in the event of my death, yourself and Dr. Smyth could without difficulty recover the money for my daughter from my estate; I give you the enclosed expressly for that purpose.” \* \* \*

Major Blackwell died in 1810, leaving plaintiff his widow, and three children. \* \* Sir Mark Wood died in 1829, having made his will, dated the 20th of September, 1826, and the defendant, now Sir Mark Wood, became his sole legal personal representative.

[ 37 ]

\* \* \* \* \*

The bill prayed that plaintiff might be declared entitled absolutely to said 3,375*l.* stock; or to a proper compensation for the same, or the value thereof, and the dividends thereof accrued since the death of Sir Mark Wood; or in case the Court should be of opinion, that plaintiff was not entitled absolutely, then that she might be declared entitled to the income thereof during her life, as from the death of Sir Mark Wood, deceased.

The material facts were uncontroverted (except as to the consent to the marriage). \* \* \*

The fact of the consent, in terms, to the marriage, was neither proved nor disproved; but it was proved that Sir Mark Wood always treated Major Blackwell as his son-in-law; and that the greatest harmony and cordiality always subsisted between them,

[ 38 ]

BLACKWELL both personally and in correspondence. The children of Mrs.  
 v. Blackwell, the plaintiff, were defendants, and submitted their  
 WOOD. interests to the Court.

*Mr. Tinney and Mr. Sidebotham*, for the plaintiff :

[ \*39 ] \* \* A full year transpired after the lady left England, before the marriage took place ; there was \*even time for an exchange of correspondence, or a document might have been sent by Sir Mark Wood to his brother, to whose entire care he committed the lady, consenting to any marriage he might think fit. If a consent was given by Sir M. Wood, it would of course be in writing ; and then it is fair to presume it would be under seal. Such a document would not, in the common course of things, be in the lady's possession, and therefore the non-production of it is no argument against its not having existed. A regular consent, according to the terms of the deed, or, at all events, a sufficient consent, must be presumed, from the very cordial manner in which Sir Mark Wood received and always treated Major Blackwell as his acknowledged son-in-law. \* \* \*

*Mr. Bickersteth*, for the children of plaintiff, submitted their claim to the Court, [and cited *Clarke v. Parker* (1), *Worthington v. Evans* (2), and other cases.]

*Sir Charles Wetherell and Mr. Lynch*, for the defendant, the present Sir Mark Wood. \* \* \*

[ 40 ] THE MASTER OF THE ROLLS [after stating the case, and deciding some points not material to this report, his Honour thus proceeded :]

[ 41 ] That brings me to the material question between this lady and her children—who is or are the party entitled ? and that depends upon the question, whether or not her marriage took place with the consent of her father. If with consent, she is entitled to the fund absolutely ; if without, the settlement points out the manner in which it is to be enjoyed by this lady and her children. It is settled by authorities, and clear upon principle, that a formal

(1) 12 R. R. 124 (19 Ves. 1).

(2) 24 R. R. 160 (1 Sim. & St. 165).

compliance with the provision is not necessary. It is too late now to contend that the father did not consent substantially to the marriage. There is no reason to presume that he would object to a marriage so respectable and advantageous for his daughter : on the contrary, we find him treating the gentleman with whom she had married, with every mark of cordiality and approbation ; and the memorandum, before referred to, shews that he was desirous of obliging him by a compliance with his wishes, which would not have been very likely to happen if they had married without his consent. But there is another strong circumstance in the case to shew his consent ; for, in the memorandum in question, he calls the stock "*my daughter's stock* ;" that may be equivocal, but, as far as it goes, coinciding with other circumstances, and in the absence of all evidence of a contrary tendency, it looks as if he considered that, according to the terms of the deed, she was entitled to it absolutely, subject to his life-interest. If the marriage had taken place without his consent, he would most naturally have called it "stock belonging to his daughter *and her children*." I do not think it necessary to go the length of presuming that the consent was given in the formal manner mentioned in the deed ; but if it were, I should not feel any difficulty in presuming it. \* \* \*

I am, therefore, of opinion, that the plaintiff is entitled to the fund absolutely.

BLACKWELL  
v.  
WOOD.

[ 42 ]

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THE ATTORNEY-GENERAL v. KING'S HALL  
AND COLLEGE OF BRASENNOSE.

(1 L. J. (N. S.) Ch. 66—83.)

Charitable uses—Appropriation of surplus funds.

1831.  
November.  
LEACH, M.R.  
[ 66 ]

[SEE the report of this case, on appeal to the House of Lords, in 2 Cl. & Fin. 295, to be given in 37 R. R.]

1832.

*January.*

LEACH, M.R.

[ 132 ]

HANSON *v.* BEVERLEY.

(1 L. J. (N. S.) Ch. 132—135.)

Vendor and purchaser—Trust fund—Trustees.

A sum of money having been given to four trustees, one of them lent a part on mortgage, and there was notice of the trust on the mortgage, which was made to that one trustee only; he subsequently called in the money, which the mortgagor procured from another person, to whom the mortgage was then assigned, and who paid the money to the single trustee alone. The mortgagor afterwards sold the property, and the purchaser objected that the payment of the mortgage-money to the one trustee alone was not a good discharge (1); but the Court was of opinion that that payment was a good discharge; the true principle being, that no person could be allowed to deal with trust-money to the prejudice of the cestui que trust, and the Court being of opinion that there had not been any such dealing by the vendor in this case; yet, inasmuch as equity will not impose the expenses of litigation upon a purchaser, the Court refused to decree specific performance, and dismissed the bill.

THE question argued at the hearing of this cause was, whether one of four trustees, having lent part of the fund on a mortgage in his own name, and in which mortgage the will creating the trusts was noticed, could alone give a discharge on the repayment of the loan.

In June, 1831, the plaintiff contracted with the defendant for the sale of an estate in Lincolnshire, for the sum of 5,300*l.*

It appeared by the abstract of the title, that in September, 1823, this property was subject to a mortgage for 3,000*l.*, which having been called in, the plaintiff applied to one Bradley to advance him the money, which he agreed to do; and by indenture, bearing date the 27th day of September, 1823, made between the mortgagees of the first part, the plaintiff of the second part, and Bradley of the third part, therein describing Bradley as one of the trustees and executors (2) named in and appointed by the last will and testament of Edward Earl, late of the island of Jamaica, seq., deceased, as to 10,000*l.* bequeathed, upon the trust mentioned in the will,—it was witnessed, that in consideration of 3,000*l.* paid by Bradley as trustee as aforesaid, the mortgagees assigned, and the plaintiff confirmed, the mortgaged premises unto Bradley, as trustee as aforesaid, his execu-

(1) See now The Trustee Act, 1893, s. 20.

(2) The words "and executors"

were not, to the best of the reporter's recollection, brought under the notice of the Court.

tors, administrators and assigns, for the residue of the mortgage term of one thousand years, subject to redemption by the plaintiff on payment to Bradley, as such trustee, of 3,000*l.* and interest.

HANSON  
v.  
BEVERLEY.

In 1826 Bradley called in the money, and the plaintiff having induced one Thew to advance it, by indenture bearing date the 14th of April, 1826, Bradley in consideration of 3,000*l.* paid to him by Thew \*at the request of the plaintiff, assigned, and the plaintiff confirmed, the mortgage to Thew.

[ \*133 ]

[The will of Earl bequeathed 10,000*l.* to Jarrett, Bradley, Kerr, and Reeves, upon trust, to place the same in the public funds of Great Britain, or under other good and lawful security, and to hold the same upon trust as therein mentioned.] This will did not contain the usual power authorizing a change in the trust-funds. \* \* \*

The pleadings stated, that Bradley had become insolvent; and the defendant by his answers submitted, whether under the circumstances the plaintiff was bound to procure the discharge of the cestui que trusts under the will for the 3,000*l.*; and whether the plaintiff, without such discharge, could make a good title to the premises; and the defendant also submitted, that such objection was a valid one to the plaintiff's title, and that he ought not specifically to perform the agreement, or take conveyance of the premises, or pay his purchase-money, except upon the terms of the said objection being cleared up.

*Mr. Bickersteth and Mr. Preston, for the plaintiff :*

It is sufficient, that a man who lends money should have it repaid to him, although he be a trustee. William Bradley, one of the several trustees, the others being in Jamaica, lent a sum of money on mortgage, reciting the will, bequeathing 10,000*l.* to him and other trustees, and that he had agreed to lend it; the proviso for redemption was on payment to him as such trustee; and there is a covenant to repay the money to him as trustee as aforesaid, his executors, administrators, and assigns, so that he might sue on the covenant. \* \* \*

The question to be decided is, the money having been paid back to the trustee from whom it was received, can the cestui que trusts impugn the transaction?

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HANSON  
v.  
BEVERLEY.

*Mr. Pemberton and Mr. Rogers, for the defendant :*

\* \* This money being invested, the trustees have no power to change the security ; the loan was made by a trustee.

The question is, whether the person who owed the money could discharge himself from the trust which attached to it by payment to one trustee. \* \* \*

In the case before the Court, the trusts are, that the four trustees should invest the money; and had the borrower attended to these trusts, he would have seen that the money could only have been lent by the four trustees : *Watkins v. Cheek*(1). \* \* It was incumbent on the person who took the transfer of the mortgage to see that the money was paid to all the trustees.

THE MASTER OF THE ROLLS :

I cannot, I think, compel the purchaser to take this title : but no case has been cited to convince me that the trustee cannot give a sufficient discharge. My opinion is, that the true principle which governs cases of this kind is, that no person shall deal with trust-money to the prejudice of the cestui que trust : but was it to the prejudice of the cestui que trust to return the money to the hands of the lender ? How then can it be stated that anything was done to the prejudice of the cestui que trust ? Were this question before me between other parties, I should have considerable difficulty in holding this to be a breach of trust ; but I cannot compel \*the purchaser to take this question through the different Courts to the last resort. No person can be allowed to deal with trust-money to the prejudice of the cestui que trust ; but I am of opinion that there has been no dealing here by the vendor to the prejudice of the cestui que trust : yet the purchaser is not to be incumbered with the expense of litigating the question. The bill must be

*Dismissed with costs.*

(1) 25 R. R. 181 (2 Sim. & St. 199).

DAVIS *v.* DAVIS.

(1 L. J. (N. S.) Ch. 155—157.)

Bequest—Implication.

The Court will not raise an implication to bequeath property, unless there are words of gift, or a manifest intention.

1832.  
Nov. 16.  
Dec.

Lord  
BROUGHAM,  
L.C.

[ 155 ]

JOHN DAVIS made his will in the following words: "It is my will that my brother Samuel Davis be my executor, to arrange, dispose of, and settle all my affairs, and I appoint him guardian to my daughter, Anna Maria."

Anna Maria was the testator's only child.

During his life, neither he nor any one else doubted her legitimacy, but after his death, it was discovered that she was illegitimate, by reason of the legal formalities not having been complied with at the time of the marriage between the testator and her mother, which point was decided by an issue sent to a court of law. The executor was one of the next of kin.

On the hearing of the cause before the Master of the Rolls(1), he decreed in favour of the daughter, on the ground that it was the intention that she should have the beneficial interest. From this decree the executor appealed.

*Sir Edward Sugden and Mr. Lynch*, for the appellant :

\* \* The testator believed his daughter to be legitimate, and therefore made no bequest to her by the will, which would have been quite superfluous, for, as next of kin, she would take all: he therefore only took care to appoint an executor and a guardian.

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\* \* The daughter has turned out to be illegitimate, and therefore she takes nothing as next of kin: and under the will, according to the proper construction of it and the settled rules of law, she takes nothing. It is clear then the appellant is entitled.

*Mr. Tinney and Mr. Barber*, for the respondent, cited *Newland v. Shephard* (2), *Hammond v. Neame* (3), *Bird v. Hunsdon* (4), *Crowder v. Clowes* (5), and *Goodright d. Hoskins v. Hoskins* (6), and other cases. \* \* \*

(1) 1 Russ. &amp; My. 645.

(4) 19 R. R. 82 (2 Swanst. 342).

(2) 2 P. Wms. 194.

(5) 2 Ves. Jr. 449. See 17 R. R. 243.

(3) 18 R. R. 15 (1 Swanst. 35).

(6) 9 East, 306.

DAVIS  
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What moral doubt could there be as to the intention of the testator, that his daughter should inherit his property? None; and therefore the Court below laid hold (as doubtless this Court would eagerly do) of an implication which the situation of the parties towards each other, father and child, naturally, if not most irresistibly raised. Under these circumstances they called upon the Court to sustain the decree of the Master of the Rolls.

THE LORD CHANCELLOR :

His Honour the MASTER OF THE ROLLS, after some consideration, held the words of this will to contain by implication a bequest in favour of Anna Maria, the daughter of the testator; and the ground of that conclusion appears to me to have been, that the attention of the testator was drawn to the daughter only, and that in nominating the executor, he did so for the benefit, not of himself, but for the benefit of his (the testator's) child. I cannot acquiesce in that decision of the Master of the Rolls; because I can see no circumstance in the case, reasonably, to raise an implication of intention in the will to give the property to the daughter. There are no words of gift whatever to that daughter; and she who then appeared to be the testator's daughter, now turns out not to be so, but merely an illegitimate child: and this has been decided by an issue directed to a court of law.

[ \*157 ]

The words perhaps, loosely taken, might imply a disposition in favour of the daughter, first, by the appointment of an executor to manage, and, secondly, by the appointment of a guardian; but still there is nothing safely and reasonably to lead us to imply a gift or bequest to her. It is not \*enough to say that the daughter was present to the mind of the testator, when he made his will, nor is it material whether he knew her to be legitimate or not: neither of those are the questions now before me; the plain simple question is, what disposition has he made by this his will, of his property?

The testator either did know his daughter was illegitimate or he did not: if he knew that she was, it may be said that he did not intend her to have the property; if he knew that she was not, how can we imply that he knew she would be safe in the enjoyment of the property, when he appoints an executor to settle

and manage his affairs? Did he intend her to take from him, as trustee, her share, according to the Statute of Distributions? Surely not, for that would be to make him die intestate in the very teeth of his will.

DAVIS  
r.  
DAVIS.

If he had died intestate, and this lady were his daughter, she would take as next of kin; but she being no daughter, can the Court conjure up a gift to her, where it can find no word of gift whatever in the will, by which she is to take? Here then is a mere stranger, for she is so since the court of law has decided her to be illegitimate, and the property is to the executor to dispose of and manage.

The respondent's counsel have cited and relied on *Newland v. Shephard*(1): now Lord MACCLESFIELD relied on the word "produce," a word, since discovered by Mr. Cox, the editor of Peere Williams' Reports, not to be in the will; we can therefore place little reliance upon the judgment. And indeed it is much more reasonable to doubt the accuracy of the report, than to believe the Judge would put so violent a construction, as he is reported to have done, upon the word "produce," and the more especially as that word was not in the will. We can therefore well understand it, when we find Lord HARDWICKE, in *Fonereau v. Fonereau* (2), in the third volume of Atkyns, expressing his disapprobation of *Newland v. Shephard*. Yet if the report were ever so accurate, still I can see quite sufficient materially to distinguish it from the present case. Another case has been much relied upon, namely, *Goodright v. Hoskins*, where Lord ELLENBOROUGH says, "The Court is glad to be warranted by authority in putting a construction on the words of a will, which it is the manifest intention of the testator to express;" but that case is very materially different from the present.

However hard the facts of this case may cause the law to work as against this young lady, still I do not feel any difficulty, upon the reasoning I have adduced, and the authorities I have before alluded to, in coming to a different conclusion from that at which the Master of the Rolls arrived. The appeal must therefore be allowed, and the plaintiff's bill dismissed, but I shall not award costs against her.

*Appeal allowed—plaintiff's bill dismissed, without costs.*

(1) 2 P. Wm. 194.

(2) 3 Atk.

1832.  
Jan. 17.

NOCK *v.* NEWMAN (1).

(1 L. J. (N. S.) Ch. 175—176.)

LEACH, M.R.

[ 175 ]

Vendor and purchaser.

The Court will not refuse the specific performance of a contract, by reason of the defendant having made a mistake as to the extent of the property, where there is no proof of misrepresentation by the vendor.

By a contract, bearing date the 24th day of July, 1829, the plaintiffs agreed to sell to the defendants for the residue of a term of five hundred years, all that messuage, tenement, or dwelling-house near the swivel bridge, over the Droitwich canal, at the free wharf in Droitwich, lately in the occupation of Walter Nock, whitesmith, and then of his widow, together with the gardens and garden ground adjoining, or nearly adjoining and belonging thereto, and also all that piece or parcel of land or garden ground opposite to, and divided from the said garden ground first above mentioned by the river Salwarpe as the same was also lately in the occupation of the said Walter Nock.

This was a bill by the vendors for a specific performance of the contract, which was resisted by the defendants, on the allegation, that the property to which the plaintiffs had made title, did not include all that they understood they had purchased, and which they alleged had been shewn to them by Mr. Curtler, whom they stated to be the solicitor to the plaintiffs, who, however, on the other hand, charged by their bill that they had made title to all they had contracted to sell, and that Mr. Curtler was not their solicitor, but the solicitor of the defendants. It appeared that the defendants had some extensive salt works at Droitwich, and that a Mr. Fowler, who had also some salt works there, was desirous of purchasing the house, gardens, and grounds in question, which were formerly the property of Walter Nock, and then in the occupation of his widow. On the 8th of July, 1829, the defendants had called on Mr. Curtler, who by their own admission acted occasionally as their solicitor, and informed him that it was desirable for their company to purchase this property, and they directed him to make enquiries about it. It happened that the plaintiffs, having possession of the title deeds, and also having been informed that they had a title to this

(1) *Tamplin v. James* (1879) 15 Ch. D. 215, 43 L. T. 520.

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NEWMAN.

property, had spoken to a Mr. Norbury, a retired solicitor, who recommended them to shew the deeds to Mr. Curtler; and, accordingly, Mary Nock, one of the plaintiffs, called upon him for that purpose, about half an hour after Mr. Curtler had had the interview with the defendants. Mr. Curtler looked at the deeds, and advised her that she and the other plaintiff were entitled to the property, whereupon she went away, leaving the deeds with Mr. Curtler, and saying that Mr. Norbury would call on him, which he accordingly did. The bill contained the following charge: that on the 9th of July the said Thomas Gale Curtler had an interview with Thomas Ledbitter, one of the defendants, and then stated to him the interview he had had with the plaintiff, Mary Nock, and Mr. Norbury; and it was then agreed they should go and look at the situation of the property, which they did, but at a distance from it; and in fact it was agreed between them that they should not go to the property, and to avoid doing so they went a circuitous route of nearly a mile to get a sight of one end of the said property, and that Mr. Curtler did not point out the boundary of the said property to the said Thomas Ledbitter, nor did in fact the said Thomas Gale Curtler know such boundary.

The defendants stated in their answer \*that the property was shewn to one of them by Mr. Curtler, and that the fact appeared to be that a slip of land which divided the property belonged to Lord Shrewsbury, although it was shewn to them as a part of it.

[ \*176 ]

*Mr. Pemberton*, for the plaintiffs.

*Mr. Bickersteth* and *Mr. Wakefield*, for the defendants.

#### THE MASTER OF THE ROLLS :

One of the defendants having heard that some new salt works were to be established, went and consulted Mr. Curtler, the solicitor, about it, and desired him to endeavour to purchase a particular property. It so happened, that a short time afterwards, on a particular day, the plaintiff Mary called upon him, to ask him whether she and her sister were not entitled to it, and he was of opinion that they, and not the widow of Walter

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NEWMAN.

Nock, were entitled; he told them that a person had been with him who wished to purchase it, and then went to one of the defendants and told him what had happened, and that he could effect the purchase for them. In order to escape the notice of Mr. Fowler, who wished to purchase this property, they went to it circuitously; they made a mistake as to the extent of the property, but the solicitor, Mr. Curtler, could not have been acting for the plaintiffs, for if he had, he would not have been anxious to escape observation, as he must have known that it was for the interests of the plaintiffs that Fowler should have known there were other persons anxious to purchase this property. I am of opinion that there was not any misrepresentation on the part of the plaintiffs; that they are entitled to have the contract carried into execution; and that the defendants are not entitled to compensation.

*Decree for specific performance, with costs.*

1832.  
June 13.

PASHELLER v. HAMMETT.

(1 L. J. (N. S.) Ch. 204—208.)

LEACH, M.R.  
[ 204 ]

Principal and surety—Change of character of principal into surety.

[A REPORT of this case before the Master of the Rolls will be found in the report of the appeal to the House of Lords in *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, to be given in a later volume of the Revised Reports.]

1832.  
June 14, 15.

KILLOCK v. GREY.

(1 L. J. (N. S.) Ch. 208—210.)

Lord  
BROUGHAM,  
L.C.  
[ 208 ]

[THIS was an appeal from a decision of Sir J. LEACH, M. R.: see 28 R. R. 92. The case is reported below in 4 Russell, 285, under the title of *Killock v. Greg*, and in 6 L. J. Ch. 128, under the title of *Maxwell v. Greg*. On this appeal the LORD CHANCELLOR said that it was plain to him that the MASTER OF THE ROLLS was right in the view he had taken, and he felt bound to dismiss the appeal, with costs. A reference to this note should be inserted at the end of the report of *Killock v. Greg*, in 28 R. R., at p. 96.—O. A. S.]

## IN THE KING'S BENCH.

WM. BROADHURST *v.* ROBERT MORRIS.

1831.

(2 Barn. &amp; Adol. 1—12; S. C. 9 L. J. K. B. 27.)

[ 1 ]

A testator devised all his share of his two estates in W. to his daughter E. B. for life, and at her decease to J. B., her husband, during his life; and at the decease of his said son-in-law J. B. he directed that the whole legacy to him should go to his grandson W. B. and to his children lawfully begotten, for ever; but in default of such issue at his decease to the testator's grandson A. B., his heirs and assigns for ever: Held, that W. B. took an estate tail in the shares of the estates in W.

THE MASTER OF THE ROLLS directed the following case to be stated for the opinion of the Judges of this Court:

Ralph Brid oak being seised in his demesne as of fee of the lands and hereditaments, and undivided shares thereof, hereafter in his will mentioned, on the 29th of November, 1796, made and published his said last will in writing, duly executed and attested, and thereby, amongst other things, devised as follows: "My will and mind is, that my dear wife, Rebecca Brid oak, enjoy and take to herself, for her own use during her life, all my personal estate of what nature or kind soever; and at her decease to my grandson Alexander Brid oak, natural son of my daughter Rebecca \*Brid oak, him and his heirs for ever. And I do further give and devise to my said wife all my real estate whatsoever and wheresoever for and during the term of her natural life, and from and after her decease I give and devise as follows: that is to say, I give to Alexander Brid oak, natural son of my daughter Rebecca Brid oak, all that my messuage or dwelling-house, with the lands and appurtenances thereunto belonging, situate and being in Bedford in the county of Lancaster; together with the half of my seat or pew in the parish church of Leigh, to him, his heirs and assigns for ever. I likewise give and devise to my said grandson Alexander Brid oak, my messuage, dwelling-house, or cottage, with the garden and croft thereunto belonging, situate in Roby in the county of Lancaster, together with my seat or pew in the parish church of Hayton, to him, his heirs and assigns for ever. I give and devise to my daughter Ellen Broadhurst all my share of the two estates I have in West-

[ \*2 ]

BROADHURST  
v.  
MORRIS.

houghton-within-Brinsop, the same during her natural life, free from the control of her husband; and at her decease I give and devise the said estates to John Broadhurst, husband of my daughter Ellen Broadhurst, during his natural life, subject, nevertheless, to a legacy of 10*l.*, which he shall pay yearly to his son William. And my will and mind is, that my said son-in-law shall not, at any time, sell, assign, or otherwise dispose of his interest in the land left him during his life, without my executors' leave; if he does, then, in such case, I do hereby revoke and make void this provision for his benefit, which shall then go to my grandson William Broadhurst. My will likewise is, that at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him shall go to my grandson William Broadhurst, \*and to his children lawfully begotten, for ever; but in default of such issue at his decease to my grandson Alexander Bridoak, natural son of my daughter Rebecca Bridoak, him, his heirs and assigns for ever."

[ \*3 ]

The testator, Ralph Bridoak, died soon after making his said will, without revoking or altering the same, leaving his said wife, the said John Broadhurst, the said Ellen Broadhurst, the said William Broadhurst, the now plaintiff, and the said Alexander Bridoak him surviving. Until the testator's death, and for some time afterwards, the plaintiff, William Broadhurst, had not been nor was married. After the death of the testator, the plaintiff entered into an agreement with the defendant, Robert Morris, for the sale to him of the shares in the hereditaments and premises situate at Westhoughton-within-Brinsop in the said will mentioned; which agreement the defendant refused to perform, alleging, that the plaintiff was entitled only to a life-estate in the premises under the will above stated. A bill was filed by the said William Broadhurst in the Court of Chancery to compel a specific performance. The question for the opinion of this Court was,

What estate and interest the plaintiff William Broadhurst took under the will in the shares of the hereditaments and premises situate in Westhoughton-within-Brinsop? The case was argued in Michaelmas Term.

*Cowling*, for the plaintiff :

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v.  
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William Broadhurst took an estate tail. The question, whether he took such estate or one for life, depends on the construction of the sentence—"at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him shall go to my grandson W. Broadhurst, and to his children lawfully \*begotten, for ever; but in default of such issue at his decease to my grandson Alexander Brid oak, natural son of my daughter Rebecca Brid oak, him, his heirs and assigns for ever." If the devise stopped at the words "lawfully begotten, for ever," the case would be governed by the rule in *Wild's* case (1), viz. that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail; "for the intent of the devisor is manifest and certain that his children (or issues) should take, and as immediate devisees they cannot take, because they are not *in rerum natura*; and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore there such words shall be taken as words of limitation." The addition of the words "for ever" in this will can make no difference. The resolution in *Wild's* case shews, that children means "heirs of the body," who may last for ever. This point was considered in *Davie v. Stevens* (2). Again, if the words "in default of such issue," were unqualified by any subsequent ones, the case would be governed by *Seale v. Barter* (3). That was a stronger case. The question there turned on the words of a codicil. By the will J. Seale would clearly have had an estate for life only, with a contingent remainder to his children in fee, according to priority of birth; and the great dispute there was, whether the codicil was intended only to give him a power of appointing which of his children should succeed him, or whether it gave him an estate tail; and the Court decided for the latter. But the case here depends on \*the effect of the insertion of the words "at his decease." It will be said that they have given William Broadhurst a life estate, with a contingent remainder to his children in fee, with an alternate contingent remainder to Alexander

[ \*4 ]

[ \*5 ]

(1) 6 Co. Rep. 17 b.

(3) 5 R. R. 676 (2 Bos. & P. 485).

(2) Doug. 321.

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v.  
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Bridoak in fee. This would rest on the supposition that the words "in default of such issue at his decease" make one passage, and are to be read, in default of such issue living at his decease. But even admitting this, the consequence will not follow. For, if we stop at the words "lawfully begotten, for ever," the general intent of the testator is clear that William Broadhurst take an estate tail; and in order to cut down this estate tail, it is absolutely necessary, as laid down by Lord ELTON, L. C. in *Jesson v. Wright* (1), that a particular intent should be found to control and alter it, as clear as the general intent before expressed. There is no such intent here: the will may be satisfied by holding that William Broadhurst took an estate tail, with a contingent remainder to Alexander Bridoak in fee in case of William Broadhurst's death without issue then living. If for "the children," be written "heirs of the body," the case will be exactly the same as the devise to Elizabeth Malin in *Ireson v. Pearman* (2). The subsequent words rather raise an inference in favour of the plaintiff's construction. The cases shew that, when it is doubtful what construction should be put on the word "children," the mere use of the word "issue" subsequently in the will raises an inference that "children" is not to be understood in its ordinary sense, but as issue, *i.e.* as "heirs of the body;" and it is immaterial whether the expression be "issue," or "such \*issue:" *Wyld v. Lewis* (3), *Robinson v. Robinson* (4). There are instances where the testator seems more to have had in view a contingent remainder than in the present case, and yet the Courts have given the parents an estate tail: *Oxford (University of) v. Clifton* (5), *Doe d. Cock v. Cooper* (6). It may be contended, that in those cases the word was "issue," not "children;" but the cases seem to go as far where the word "children" is used, *Hodges v. Middleton* (7); and Lord HALE, in *King v. Melling* (8), appears to admit that children may be made *nomen collectivum*, though there be children at the time *in esse*. It seems to be settled that where a freehold is devised to a parent, and after-

(1) 21 B. R. 1 (2 Bligh, 1).

(2) 27 R. R. 490 (3 B. & C. 799).

(3) 1 Atk. 432.

(4) 1 Burr. 38.

(5) 1 Eden, C. C. 473.

(6) 6 R. R. 264 (1 East, 229).

(7) Dougl. 431.

(8) 1 Vent. 225, 231.

wards to children, it is immaterial whether the word used for his descendants be "children" or "issue." They are put on the same footing in the resolution in *Wild's* case (1), and in *Doe d. Smith v. Webber* (2). Not only is there no evidence of intention in favour of the defendant's construction, but it would be contrary both to the particular and general intent of the testator. First, to the particular intent. For, wherever the testator in any other part of the will has given a life estate, he has expressly limited it for life; so, with respect to a remainder, he has always used words expressive of such estate; as, "at her decease," "from and after her decease," &c. So, of an estate in fee, he always says, "to him and his heirs for ever," and the like. This shews he did not intend \*either W. Broadhurst to take a life estate, or his children a remainder; or if he had, that they should take a fee. This argument was much relied on by Lord HALE in *King v. Melling* (3), and by Lord KENYON, Ch. J. in *Doe d. Comberbach v. Perryn* (4). Secondly, such construction would be contrary to the general intent. If children be a word of purchase, then "such issue" means "such children:" *Denn d. Briddon v. Page* (5); and the words should be read thus—"in default of such children living at his decease." So that those children only who survived William Broadhurst could share in the estate; and if any died in his lifetime leaving issue, their issue would be disinherited, and the estate would either go over to the surviving children, or if there were none, to Alexander Bridgok. This could not be the intention of the testator, for he clearly means to provide for the offspring of his two daughters, Rebecca and Ellen. He gives some estates for this purpose to Alexander Bridgok, son of Rebecca, in fee, and others to William Broadhurst, son of Ellen, by the clause in question. And he could never intend that estate to go over to Alexander Bridgok so long as there were any descendants of William Broadhurst. Such a consideration as this was thought material in *Wyld v. Lewis* (6), *Doe v. Perryn* (4), *King v. Burchall* (7).

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[ \*7 ]

(1) 6 Co. Rep. 17 a.

11 East, 603, n.).

(2) 19 R. R. 438 (1 B. & Ald. 713).

(6) 1 Atk. 432.

(3) 1 Vent. 225, 231.

(7) 4 T. R. 296, n. (d); 1 Eden,

(4) 1 R. R. 757 (3 T. R. 484).

C. C. 424.

(5) 1 R. R. 655, n. (3 T. R. 87, n.);

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[ \*8 ]

But, further, the words are not to be read as if they were “in default of such issue living at his decease,” but a comma should be inserted at the word “issue,” and then the sentence reads thus, “in default of such issue, (then) at his decease to,” &c. According to this construction, the words “at his decease” are equivalent \*to “remainder.” Those words are frequently so used from a testator’s not knowing the difference between a vesting in interest and in possession. In this will they are invariably used in that sense. Alexander Bridoak would then take a vested remainder in fee. The testator knew that according to the ordinary course of things, Alexander Bridoak’s estate in remainder could not commence in possession until the death of William Broadhurst; and, therefore, he used that expression, dating, as it were, Alexander Bridoak’s estate from the time of William Broadhurst’s death, though in law it had been vested in interest before. This case will then be similar to *Walter v. Drew* (1), and also *Doe v. Cooper* (2), if the remainder there was a vested one, as seems to have been the opinion of the Court. No devise is to be found in the books in which there has been the expression “in default of issue at his decease.” In all the cases the testator has either said “in default of issue living at his decease,” or used some informal expression, which was generally construed to mean an indefinite failure of issue. The construction of the defendant is one which the Court will lean against; for contingent remainders are not favoured in the law. There is no case to be found in which there have been in one sentence words which in a will are sufficient to pass an estate tail, and that estate has been pared down by words in a subsequent and distinct sentence into an estate for life: the words which cause the “children, i.e. issue,” to take contingent remainders, have always been inserted in the same sentence in which the estate has been limited to them, or in a prior one.

[ 9 ]

*Preston*, for the defendant:

William Broadhurst took an estate for life, remainder to his children as joint-tenants in fee, with an alternate contingent remainder to Alexander Bridoak in fee, which would change into

(1) Comyns’s Rep. 372.

(2) 6 R. R. 264 (1 East, 229).

an executory devise on the birth of a child to William Broadhurst, and which was not barrable. The estate would vest in a child on its birth, subject to open and let in the other children as they came *in esse*. The question depends wholly on the intention of the testator. *Doe v. Burnsall* (1) is in point. There the devise was to M. Owstwick and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving issue, then over; and it was held that M. Owstwick took only an estate for life. That case was stronger than the present in favour of an estate tail, on account of the word "issue" being there used and not "children" as here; that they were to take as tenants in common and not as joint tenants was only one ingredient against the construction of an estate tail. Besides, here are words of inheritance which were wanting there. *Merest v. James* (2) is also in favour of the defendant. In many cases the general intention would be defeated, unless all the issue should take, and that is the only reason for implying estates tail: *King v. Burchall* (3). There is no such necessity here. According to the plaintiff's construction, the words "at his decease" should be considered as struck out. But those words cannot be so rejected. This case must be governed by *Doe v. Burnsall*, *Merest v. James*, and *Crump v. Norwood* (4). In the last case the devise was to \*three nephews during their lives, and after their decease to the heirs of their bodies as tenants in common. It was not disputed that the nephews took an estate for life; and GIBBS, Ch. J. cited and relied on *Doe v. Burnsall*. The Court should lean against the construction contended for by the plaintiff: no man of sense would make such a devise, since the tenant in tail could bar it at any time by a recovery. In *Davie v. Stevens* (5) there were limitations over on an indefinite failure of issue, and the case turned on that point. In *Seale v. Barter* (6), the testator's intention was clearly to create an estate tail in the first taker, the parent, and the limitations over assisted such intention. In

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[ \*10 ]

(1) 3 R. R. 113 (6 T. R. 30).

(2) 1 Brod. & Bing. 484.

(3) 4 T. R. 296, n. (d).

(4) 7 Taunt. 362.

(5) Doug. 321.

(6) 5 R. R. 676 (2 Bos. & P. 485).

BROADHURST *Wyld v. Lewis* (1), the gift to the sons was only by implication, and the word "sons" was used collectively, and imported all issue male. Here there is an express gift to children, as children in the first degree with the words "for ever," under which they may take the fee. *Hodges v. Middleton* (2) was expressly over-ruled in a case in Chancery, which has not been reported on this point, viz. *Charles Monck and others v. The Commissioners of Woods and Forests*.

*Couling*, in reply :

[ \*11 ]

*Doe v. Perry* (3), *King v. Burchall* (4), and *Wyld v. Lewis* (1), shew that the estate would not vest on the birth of a child, but only in such as should be living at the death of W. Broadhurst. The circumstance, that the children would be joint tenants, is in favour of the plaintiff's construction ; \*for it is usual to give estates to purchasers as tenants in common, and not as joint tenants. (Per Lord HENLEY in *King v. Burchall* (4).) The cases of *Doe v. Burnsall* (5), *Merest v. James* (6), and *Crump v. Norwood* (7), are consistent with the rule before stated as deduced from the cases ; in all of them, the words which caused the children to take as purchasers were part of the same sentence by which the estate was given them. The cases in which "children," "issue," &c. have taken contingent remainders after estates of freehold given to their parents, are of two kinds : 1st, where a remainder is limited by express words, as in *Loddington v. Kime* (8); 2ndly, where the testator has affixed some quality to the estate given to the issue, which is inconsistent with their taking by descent, as in *Doe v. Burnsall* (5), where they were to take as tenants in common. In this case, however, the words relied on by the defendant as paring down the estate tail are part, not of the sentence by which the estate tail is limited to them, but of a subsequent one ; they come by way of proviso, not of exception. Besides, in *Doe v. Burnsall* it was unnecessary to decide whether M. Owstwick

(1) 1 Atk. 432.

(2) Dougl. 431.

(3) 1 R. R. 757 (3 T. R. 484).

(4) 4 T. R. 296, n. (d) ; 1 Eden, C. C. 424.

(5) 3 R. R. 113 (6 T. R. 30).

(6) 1 Brod. & Bing. 484.

(7) 7 Taunt. 362.

(8) 1 Salk. 224.

took an estate tail, or one for life ; for in either case the recovery suffered had barred the contingent remainders over. As to *Crump v. Norwood*, it may be doubted whether that case be not reversed by *Jesson v. Wright* (1).

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v.  
MORRIS.

*Cur. adv. vult.*

The following Certificate was afterwards sent :

“ This case has been argued before us by counsel. \*We have considered it, and are of opinion that the plaintiff W. Broadhurst took under the will of Ralph Bridoak an estate tail in the shares of hereditaments and premises situate in Westhoughton-within-Brinsop therein mentioned.

[ \*12 ]

“ TENTERDEN,  
“ J. PARKE,  
“ W. E. TAUNTON.”

## REX v. THE COMPANY OF PROPRIETORS OF THE CHELMER AND BLACKWATER NAVIGATION.

1831.  
Jan. 28.

(2 Barn. & Adol. 14—22 ; S. C. 9 L. J. M. C. 125.)

[ 14 ]

By an Act for making a navigable communication between two places therein mentioned, a Company was formed, and authorized to purchase lands, &c. for the use of the navigation, and to make and maintain the same. The Act then directed that the Company should be rated and charged to all Parliamentary and parochial taxes, rates, and assessments for any lands to be purchased or taken, or warehouses or other buildings to be erected by them in pursuance of that Act, in the same proportions as other lands and buildings adjoining to or lying near the same were or should be rated and charged :

Held, that the Company were liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation.

UPON an appeal against a rate for the relief of the poor of the parish of Heybridge in the county of Essex, dated the 20th of May, 1830, whereby the Company of Proprietors of the Chelmer and Blackwater Navigation were rated and assessed upon the annual rental of 800*l.* as occupiers of wharfs, granaries, dock, and land used for a navigation and towing-path, the Court of

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Quarter Sessions amended the rate by reducing the sum of 800*l.* to 187*l.* 3*s.*, subject to the opinion of this Court on the following case:

By an Act of the 33 Geo. III. c. 93, entitled, "An Act for making and maintaining a navigable communication between the town of Chelmsford, or some part of the parish of Springfield in the county of Essex, and a place called Collier's Reach in or near the river Blackwater in the said county," certain persons therein named and their several and respective successors, executors, administrators, or assigns were united into a Company by the name of "The Company of Proprietors of the Chelmer and Blackwater Navigation," and were authorized to purchase lands, tenements, or hereditaments for the use of the said navigation, and for other the purposes mentioned in the Act, and to make and maintain navigable and passable for boats, barges, and other vessels, the said \*navigation through the several parishes therein mentioned. And in the same Act it is provided "that the said navigation, or any works whatsoever to be made by virtue of the powers of this Act, shall not be subject to the control, direction, survey, or order of any commissioners of sewers, or to any law or statute relating to sewers, any thing herein contained, or any former law or statute to the contrary notwithstanding. And the said Company of Proprietors shall and may from time to time hereafter be rated and charged to all Parliamentary and parochial taxes, rates, and assessments, for or on account of any lands or grounds to be purchased or taken, or of any warehouses or other buildings to be erected by them in pursuance of this Act, in the same proportions as other lands, grounds, and buildings adjoining to or lying near the same are or shall be rated and charged."

[ \*15 ]

In pursuance of the powers of this Act, the Company of Proprietors made and completed the navigation before described, by deepening and cleansing, and in some places widening the channel of the river Blackwater, and by occasionally making cuts or deviations from the line of the river. These additional cuts, and the towing-paths along the whole line of navigation, were made upon lands purchased and held by the Company under the powers of the Act. It was admitted on the hearing of

the appeal, that for these new cuts and the towing-paths, or the profits arising from them exclusively, and not for any profits arising from the old bed of the river, the appellants were rateable. In the parish of Heybridge the new cut leading to what is termed the sea-basin is something more than a mile and a half in length. In the other parishes through which the navigation passes \*the new cuts are of much less magnitude than in the parish of Heybridge, having been taken for the purpose of making locks and wears, the expenses of keeping up which are much greater than the profits accruing to the Company in those respective parishes, from the land so taken, exclusive of the old bed of the river. If the Company were to be rated for the new cuts, and for the wharfs and buildings occupied by them in the parish of Heybridge, according to the profits arising to them therefrom within the parish, the Court found the sum of 187*l.* 3*s.* ought to be the sum inserted in the rate instead of 800*l.* But if the Company were to be rated for their new cut, wharfs, and buildings in the parish, without reference to navigation profits, in the same proportions as other lands, grounds, and buildings adjoining thereto in the parish of Heybridge, then the Court found that the sum of 35*l.* ought to be inserted in the rate instead of 800*l.*

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[ \*16 ]

The question for the opinion of the Court was, whether the appellants were exempt from any rateability in respect of the land taken and used by them for the purposes of the navigation as aforesaid, beyond the value of the adjoining land? If so, then the sum to be inserted in the rate was to be reduced to 35*l.*; otherwise, to stand at 187*l.* 3*s.*

The case was argued in Hilary Term by *Campbell* and *Knox* in support of the order of Sessions, and *D. Pollock* and *Mirehouse*, *contrà*. The principal points of the argument are so fully commented on in the judgment of the Court, that no statement of them will be necessary here.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., in the same Term delivered the judgment of the Court:

[ 17 ]

The question in this case is upon the meaning of the words, “in the same proportion as other lands, grounds, and buildings

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adjoining to, or being near the same, are or shall be rated or charged ;” whether, in assessing the lands and buildings of the Company, their value is to be estimated according to the value of other adjoining lands and buildings, or the assessment is to be made upon that proportion of the actual value (say three-fourths or four-fifths), upon which the other lands and buildings are assessed. I propose to consider the matter, first, without reference to any of the cases that bear upon the question ; and, secondly, with reference to those cases.

The first thing that strikes the mind upon the latter construction of the Act is, that it supposes the Legislature to have contemplated, that property is not rated according to its actual value, but according to some part only of that value. In fact, this mode of rating is sometimes adopted ; but I conceive the law generally assumes that all rateable property is to be rated according to its actual value. The statute of Elizabeth does not point to any other estimate. If all the property of the same kind in a parish is rated only upon some definite part of its actual value, the effect is the same as if the rate were upon the entire actual value, and no occupier of such property has any ground of complaint. If, in making the assessment, the rent is first considered, and then the rate upon land is made on a certain part of the rent, and the rate upon houses on some greater part of, or the whole rent, which is \*sometimes done, this is not properly a rating upon a part only of the value, but upon all the supposed real value ; because, in estimating the value of land, it may be reasonable to make a greater deduction from the rent, than is made from the rent of houses, on account of the greater expense (of cultivation and repairs) in the case of lands than in the case of houses.

[ \*18 ]

The Act of Parliament upon which the question arises, was passed for the purpose of making a river navigable. It was foreseen that this object could not be effectually accomplished without making, in some places, new cuts and channels deviating from the ancient course of the river, erecting locks or wears in some places to overcome the inconvenience of natural falls and changes of level, and erecting buildings for the residence of lock-keepers or collectors of tolls, or for warehousing merchandize,

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and power is therefore given to the Company to purchase land for these purposes. It was well observed in the argument at the Bar, that the ground taken for locks or wears would be productive of no value in the hands of the Company, there being no lockage dues, but only a mileage toll. The Company are not rateable in respect of the ancient course of the river, for the soil thereof is not vested in them, nor are they properly the occupiers thereof, but entitled only to the privilege of using it in the nature of an easement. No rate can be imposed upon tolls *eo nomine*, so that if there should happen to be in any parish no new cut or channel made, nor any profitable building erected, but land should be bought for locks and wears which are in themselves unprofitable, it might be contended that the Company would not be rateable at all for the land so taken, and \*the rateable property in the parish would be *pro tanto* diminished, and the parish therefore would lose by the project authorized by the statute; while in another parish where land should be taken for a new cut or channel, or the erection of a profitable building, the amount of the mileage toll for passing along such new cut or channel, or the profit of the building, might be greater than the value of the neighbouring land, or the profit of similar buildings, and in this instance the parish would gain by the project. Whereas, if the land taken and buildings erected throughout the whole line are estimated and rated according to the value of the adjoining land and similar buildings, no parish will either lose or gain by the project, but every parish will be in the same situation as if the Act had not passed, or nothing had been done under it. So, also, if the whole undertaking should prove unprofitable, as some projects of this kind have done, and the amount of the mileage toll, or receipts of the buildings erected, should be less than the value of the neighbouring land or of similar buildings, no parish would become a loser by the diminution of the value of rateable property within it, at whatever period of time such diminution might happen to take place. And if we suppose the Legislature to have intended to prevent loss or gain to the parishes, and to leave all in the same state and condition as if no land were taken or building erected by virtue of the Act, we must construe the words in question to mean, that the land

[ \*19 ]

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[ \*20 ]

and buildings of the Company shall be estimated for the purpose of rates, according to the value of other land and buildings adjoining or near: that the value shall be taken according to that rule, without regard to \*any increase or diminution of actual value. And the words used may certainly very well admit of this sense and construction. It may be observed, also, that this is an affirmative clause of the Act, intended to designate the rating; and if it mean only that the Company shall be rated on the same part of the value of their property as the adjoining lands and buildings, it will be quite useless and ineffectual, because a rate on a different part, whether greater or less, would be bad, being manifestly unequal and unjust.

I come now to advert to the decided cases. The first in order of time is the case of *Rex v. The Leeds and Liverpool Canal Company* (1). The Acts of Parliament upon which that case arose were passed, and the case came before the Court before it was established that navigation tolls are not rateable *eo nomine*; the decision does not furnish any authority on the present subject; but it seems probable that the case led the way to the rule against rating tolls, that was soon afterwards established.

The next case is the case of *Rex v. Saint Mary, Leicester* (2), which came before the Court after it had been settled that tolls *per se* were not rateable. That arose upon an Act passed in the same session of Parliament as the Act in question, and contains a similar clause as to rating, following also, as this does, the clause of exemption from the jurisdiction of the sewers. The Sessions reduced the rate upon the Company to the value of the lands and buildings belonging to the Company, in proportion to the lands and buildings adjoining, exclusive of the tolls. This Court confirmed the order, being of opinion that \*tolls *per se* were not rateable, and that there was no doubt, upon the construction of the Act, that it had prescribed a special and definite mode of ascertaining the value of the land, which excluded the consideration of the tolls. It is true, that that Act contained also a prior clause on the subject of rating, which might contribute to shew the intention of the Legislature; but it seems that either clause, if taken alone, must have received the same

[ \*21 ]

(1) 5 East, 325.

(2) 6 M. & S. 400.

construction, as to land, which alone is mentioned in the first clause, warehouses and buildings being mentioned in the second only.

Next came the case of *Rex v. Grand Junction Canal Company* (1). In that case there were two Acts of Parliament: the first contained a clause similar to the present, certainly not more favourable than the present, to the construction which prevailed. The clause in the latter Act rather raised doubt and uncertainty: and was evidently less favourable to the construction adopted by the Court. It was argued there as here, that the word "proportion" meant part of the actual value; but the argument was repudiated by the Court, and the assessment allowed was upon the same principle as that proposed by the Sessions in the present case, in reducing the rate to 35*l*.

The next case is that of *Rex v. Inhabitants of St. Peter the Great, Worcester* (2). That case arose upon two Acts containing clauses similar to those in the two Acts relating to the Grand Junction Canal; and the Court held, that the improved value of the land, by the receipt of tolls, could not be taken into consideration. The last case is that of *Rex v. Inhabitants of Kingswinford* (3). There were several Acts of Parliament, the \*last of which contained a clause like the present. But no question was made as to the construction or effect of that clause. The only question was, whether the Company were rateable in King's Swinford, according to the value of the tolls earned in that parish, or upon that proportion of the tolls earned on the whole line which the length of the canal in that parish bore to the length of the whole line; and the Court very properly decided that the rate should be according to the amount of the earnings in the particular parish.

Upon this view of the cases, it appears that there is not any decision against the reduced rate proposed by the Sessions in this case. And the two cases of *Rex v. Grand Junction Canal* and *Rex v. Inhabitants of St. Peter the Great, Worcester*, are plain authorities in favour of it, there being no substantial difference in the language of the statutes.

(1) 19 R. R. 316 (1 B. & Ald. 289).

(2) 5 B. & C. 473.

(3) 31 R. R. 181 (7 B. & C. 236).

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[ \*22 ]

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In this case, therefore, the rate must be reduced to 35*l.*, that is, to the value of the land and buildings of the Company, estimated according to the value of the adjoining lands and buildings, and not according to their actual productive value to the Company.

*Rate reduced accordingly.*

1831.  
Jan. 27.

[ 23 ]

LLOYD *v.* ASHBY, H. R. ROWLAND, AND SHAW (1).

(2 Barn. & Adol. 23—29; S. C. 9 L. J. K. B. 144; S. C. at Nisi Prius, 2 Car. & P. 138.)

A., R., and O. carried on business as partners, under the firm of Ashby & Co., from February, 1820, to May, 1824, when O. retired, and the other two partners agreed to liquidate all the debts due from the partnership, and they continued the business as partners, under the firm of Ashby and Rowland. In June, 1824, S. agreed to become a member of this last-mentioned partnership, as from the 18th of May preceding, but his name was not to be introduced, and the business was still carried on under the names of Ashby and Rowland only.

In July, 1824, H., being indebted to L., drew a bill of exchange in his favour upon Ashby & Co., which bill was accepted by the partner R. in the names of Ashby and Rowland. H., the drawer of the bill, had had dealings with the firm of A., R., and O.; but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between H., the drawer, and A., R., and S., after the entrance of S. into the partnership. The name of S. was never used or made known to any person dealing with the firm:

Held, that A., R., and S. were liable upon this bill as acceptors.

ASSUMPSIT by the plaintiff as payee against the defendants as acceptors of a bill of exchange for 82*l.* 12*s.* The defendant Rowland suffered judgment to go by default. The other defendants, Ashby and Shaw, pleaded the general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Michaelmas Term, 1825, the plaintiff was nonsuited, subject to the opinion of this Court on the following case:

The plaintiff, an engineer and millwright, had made articles of machinery for Hugh Rowland, the father of the defendant H. R. Rowland, in or about July, 1824. The charge for these articles amounted, at reasonable prices, to 82*l.* 10*s.*; and, in

(1) Cited by Mr. Chalmers as an illustration of the 17th section of the Bills of Exchange Act, 1882.—R. C.

payment of that sum, Hugh Rowland, a short time before the delivery of the goods, viz. on the 28th of July, 1824, drew, payable to the order of the plaintiff, and delivered to him, the bill of exchange in question, addressed to Messrs. Ashby & Co. London.

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From February, 1820, to May, 1824, the defendants Ashby and Rowland, and one Richard Osborne, carried on the business of printers and engravers as partners, under the firm of Ashby & Co. In May, 1824, Osborne \*retired from the partnership, and the defendants Ashby and Rowland continued the business as partners, under the firm of Ashby and Rowland. By agreement between Ashby and Rowland and Osborne, the continuing partners were to liquidate all the debts due from the partnership. In June, 1824, articles of agreement were executed between the defendants Ashby and Rowland and the defendant Shaw, under which Shaw advanced 1,500*l.*, as a consideration to Ashby and Rowland, and became a partner in the concern as from the 18th of May preceding, being the day on which the former partnership was dissolved as to R. Osborne. By these articles it was provided, that the partnership should be carried on under the firm of Ashby and Rowland, (the name of Shaw not being introduced,) and that the personal attendance of Shaw should not be required except as he might be minded to attend. The business was accordingly continued in the names of Ashby and Rowland until September, 1824, when the partnership was dissolved as far as regarded the defendant Rowland. The bill, after delivery thereof to the plaintiff, was accepted in the following form: "Accepted, ASHBY and ROWLAND, at Messrs. Veres, Ward, & Co." The acceptance was in the handwriting of the defendant Rowland. The bill was presented when due, and payment was refused.

[ \*24 ]

Hugh Rowland, the drawer of the bill, had dealings with the firm of Ashby, Osborne, and Rowland, by selling goods to them; but whether that partnership was indebted to him or not at the time when the bill was drawn, did not appear at the trial, nor did it appear that there had been any dealings between the drawer \*of the bill and the partnership of the defendants subsequently to the defendant Shaw's entrance into the partnership. Shaw went abroad immediately after the execution of the partnership deed, and did not return until the September following; and

[ \*25 ]

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during that time his name was not used or made known to any person dealing with the partnership, or to the clerks of the partnership. It did not appear that the plaintiff, when he received the bill from Hugh Rowland, had any knowledge of him, except that he had given the plaintiff the order for the goods; nor that the plaintiff, when he so received the bill, or at the time of its acceptance, had any knowledge of the firm of Ashby & Co. on which the same was drawn, or of the state of accounts between that firm and Hugh Rowland the father, or knew the name of any of the partners; but it was proved, that on receiving the bill, and before its acceptance, he directed an enquiry into the responsibility of the firm, and also sent to the house where the defendants carried on business to enquire whether they would accept the bill, and that the person he sent had a conversation with a person unknown to him, (but who was not the defendant Rowland,) in an inner room or counting-house in the house where the business was carried on, and informed that individual on what consideration the bill was drawn, and asked him whether it would be accepted, to which he answered that it would. The question for the opinion of this Court was, whether the plaintiff was entitled to maintain his action against the defendants for the amount of the acceptance.

This case was argued in last Michaelmas Term, by

[ 26 ]

*Hutchinson*, for the plaintiff :

In the absence of fraud, the acceptance of one of several partners, in the name of the partnership, binds all. If the party accepting had no authority from the other partners to accept, and that be known to the person taking the bill, he is guilty of a fraud and cannot recover upon it. But that is not the case here. The want of authority is not to be inferred, even if the bill be taken not for value. And if it could, it is questionable whether, under the circumstances, a payee, taking without fraud or collusion, may not maintain an action. Here the payee took the bill for value, and did (what a prudent man would do) inquire whether the bill would be accepted. It may be said that the plaintiff did not know who the partners were, and, therefore, that it was not taken on the credit of Shaw. The bill here,

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however, having been drawn on Ashby & Co., and accepted by the firm in the name of Ashby and Rowland, by which Ashby, Rowland, and Shaw had agreed to go, it is the same thing in effect as if Shaw had been named in the acceptance. Shaw had given authority to the two to use those names as representing him. In *Vere v. Ashby* (1), BAYLEY, J. lays it down as a general rule, "that where the partnership name is pledged, any person who either is an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership is pledged, is privy to an intent to misapply the money." Here the partnership name was pledged, and there was no evidence of an intention to misapply the money. In *Wells v. Masterman* (2), Lord KENYON \*says, that a bill drawn on a partnership in their usual style and firm, and accepted by one partner, binds the whole; except where it is put in force by a fraudulent drawer.

[ \*27 ]

*Scarlett*, Attorney-General, *contra* :

Hugh Rowland, the drawer of the bill, had transactions with the old firm of Ashby, Rowland, and Osborne, which was carried on under the names of Ashby & Co. The new firm was afterwards carried on under the firm of Ashby and Rowland, but the drawer of the bill had no transactions with the firm in which Shaw was a partner. The bill is here drawn on Ashby & Co. The drawer sold goods to Ashby, Rowland, and Osborne. It must be assumed, therefore, that it was drawn for a debt due to him from Ashby, Rowland, and Osborne. There was no evidence of any dealings between any of them and the drawer after Osborne had quitted or Shaw had joined the firm. He knew nothing of Shaw when he drew on Ashby & Co. If the drawer's son had accepted the bill in the name of Ashby & Co., there could have been no question. Suppose Hugh Rowland the father had said, I will give you a bill on the firm of Ashby & Co., of which my son is liquidating the debts, could it then be contended that the bill taken was that of any other firm? Shaw having desired his name not to be used, his liability depends entirely on his interest; for here his credit never has been pledged. The

(1) 34 R. R. 408, 415 (10 B. &amp; C. 288, 296).

(2) 2 Esp. 731.

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[ \*28 ]

firm paying the debts of Ashby & Co., accepted the bill for a debt due from that firm. Shaw, a dormant partner in the house of Ashby and Rowland, was not a party to that debt, and had no interest in the funds applicable to its payment. The debt was not \*contracted during the time he was a partner. *Wells v. Masterman* (1), is rather in favour of the defendant. There it was held that a bill, though drawn on a partnership firm and accepted by one of the partners, if for a separate debt of one of them, shall not bind the firm, as to a party who knew the consideration of the bill. Applying that rule to the present case, here Hugh Rowland draws a bill on Ashby & Co., and it is accepted by Ashby and Rowland for a debt due from Ashby & Co. Ashby & Co. were at that time an existing company, for they had debts to pay. The giving of the bill to the plaintiff was an assignment of a debt due from Ashby & Co., not from Ashby and Rowland. The plaintiff knew the bill as one of Ashby & Co. If Rowland's son had told the father in terms that there was a new partner Shaw, the father could not have drawn it upon Shaw, whom he knew to have nothing to do with the debt he was about to assign to the plaintiff.

*Hutchinson*, in reply :

[ \*29 ]

The argument on the other side assumes, that the bill was on account of a debt due from Ashby & Co. to the drawer. But that does not appear by the case. It is also assumed that the bill is drawn on the old firm. It is accepted in the name of Ashby and Rowland only. The old firm did not exist at the time when the bill was drawn. The acceptance was that which alone could have been given on any other bill, for Shaw's name was not to be used. Here Ashby and Rowland carrying on business under that name jointly with Shaw, have accepted a bill drawn on Ashby & Co. \*They have thereby acknowledged that Ashby, Rowland, and Shaw are the persons intended by the drawer.

*Cur. adv. rult.*

LORD TENTERDEN, Ch. J., in Hilary Term, delivered the judgment of the COURT :

We have considered this case, and are of opinion, upon the

(1) 2 Esp. 731.

whole, that the plaintiff is entitled to recover. The bill was addressed to the firm of Ashby & Co., but was accepted in the name of Ashby and Rowland. The firm was in fact composed of Ashby, Rowland, and Shaw, but the names and style they had agreed to use were Ashby and Rowland. Shaw was interested in the house at the time of the acceptance. No fraud was found. A valid consideration was given for the bill. Notwithstanding the variance between the names to which the bill is addressed and those in which it is accepted, we are of opinion that the three defendants must be taken to be the persons designated by the acceptance in the name of Ashby and Rowland, and that the acceptance binds them all. That being so, there must be a new trial.

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*Rule absolute for a new trial.*

THE DOCK COMPANY AT KINGSTON-UPON-HULL  
v. WILLIAM BROWNE AND OTHERS (1).

1831.

[ 43 ]

(2 Barn. & Adol. 43—63.)

The port of Kingston-upon-Hull is mentioned in Acts of Parliament, charters, and other documents, in two senses; first, according to the popular understanding, as denoting a particular place; and, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

The statute 14 Geo. III. c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the Company's basin or docks within the port of Kingston-upon-Hull, or unlading or lading any of their cargo within the said port, must be construed as using the term "port" in the popular sense; and not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull; as Goole, on the river Ouse.

DEBT for tonnage duties in respect of ships and vessels of the defendants having laden and unladen goods within the port of Kingston-upon-Hull. Plea, *nil debent*.

At the trial before Bayley, J., at the Lent Assizes for Yorkshire,

(1) Distinguished in *Nicholson v. Ry. and Canal Co.* (1879) 4 App. Cas. Williams (1871) L. R. 6 Q. B. 632, 197, 205, 49 L. J. Q. B. 130, 135.—40 L. J. M. C. 159. Cited by Lord R. C.  
PENZANCE in *Pryce v. Monmouthshire*

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1829, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case :

The plaintiffs are the proprietors of extensive docks, basins, quays, and wharfs at the town and port of Kingston-upon-Hull ; the defendants are the owners of a brig which sailed with goods, on the 14th of April, 1828, from Goole on a voyage to Hamburgh, and returned the following month with a cargo of wool and hides from Hamburgh to Goole. Goole is situated on the river Ouse, and is within and parcel of the duchy of Lancaster ; and the undertakers of the Aire and Calder Navigation have there recently made docks (being artificial excavations in the land adjacent to the river), and built quays, warehouses, and other conveniences suitable for carrying on a foreign trade. Kingston-upon-Hull is a town corporate, the mayor and corporation of which have jurisdiction over the town, and county of the same. It lies upon the river Humber, into which river, and considerably to the westward of the town, fall the two \*rivers Ouse and Trent, the former passing from York to Selby, Rawcliffe, Howden, and Goole in the order here mentioned ; Goole being about twenty-five miles from Kingston-upon-Hull ; the latter running from Stockwith and Gainsborough ; and both losing at their confluence their respective names in that of Humber. On the south side of that river are situated the several towns or places of Barrow, Barton, Brigg, and Ferriby-Sluice, all above the town of Kingston-upon-Hull.

[ \*44 ]

By an Act of Parliament, 14 Geo. III. c. 56, for making and establishing public quays at Kingston-upon-Hull, &c. and for the benefit of commerce in the port of Kingston-upon-Hull, and for making divers works for the accommodation of vessels using the said port ; after reciting an Act of the 14 Car. II. (which again recites an Act made 1 Eliz., directing that no goods, &c. should be shipped or discharged but in or upon certain places therein described, except the port of Hull), by which Act of Charles II. the King was enabled, by his commission, to appoint from time to time such places wherein it should be lawful so to ship and discharge goods, except the town of Hull, &c. ; by reason of which exception, the present Act (of 14 Geo. III.) was necessary for the purpose of establishing lawful quays at the port of Kingston-upon-Hull : It was amongst other things enacted, that his Majesty

should assign necessary places and quays at Kingston-upon-Hull, and settle the extents and limits of the same, on which quays, &c. all goods brought by way of merchandize from any of the parts beyond the seas were to be landed. And for the purpose of reimbursing the Company therein described for making and maintaining the basin, docks, and other works there mentioned, and enabling them to keep the said works in \*repair, certain rates were to be paid by ships or vessels (with certain exceptions) coming into or going out of the harbour, and the said basin or docks within the port of Kingston-upon-Hull, or lading or unlading within the said port (1). But it was enacted, that vessels coming coastwise from or to any place up the rivers Trent or Ouse, within the limits of the port of Hull as then used, should not be liable for the rates unless such vessels should come into or go out of the said basin or dock, or any part of the harbour called Hull Basin, or should lade or unlade within any part of the river Humber, or if such vessels should go into the said harbour solely for the purpose of custom-house clearance. It was also enacted, that regulations to be made in furtherance of the Act should be published in the town of Kingston-upon-Hull; and that any two justices of the peace of Kingston-upon-Hull might issue a warrant for distraining for \*penalties incurred under that Act, with a power of appeal to the Quarter Sessions held for the

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[ \*45 ]

[ \*46 ]

(1) The substance of section 42 is as follows: "That in consideration of the expenses incurred by the Company about the basin, &c. there shall be payable and paid, from and after the 31st day of December, 1774, to the said Company, or to their collectors or deputies for their use, for every ship or vessel (the King's ships of war, and other ships and vessels employed in his Majesty's service, only excepted,) coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull; or unlading or putting on shore, or lading or taking on board, any of their cargo or any goods, wares, or merchandize, within the said port, by the master or commander, owner or owners of every

such ship or vessel, the several rates or duties of tonnage hereafter described; that is to say, for every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port to the northward of Yarmouth, &c. for every ton two-pence. (And so as to other places.) Which rates or duties shall be and are vested in the Dock Company, and shall be paid at the vessel's entry inwards, or clearance or discharge outwards: or in case any ships or vessels shall not enter as aforesaid, then, at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port."

Section 44 is given at length in the judgment.

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town and county of the town. The rights of the Trinity House in and concerning the haven of the town of Kingston-upon-Hull were especially reserved; and the rights of the corporation to have the port called Sayer Creek, then called Hull, for ever annexed to the said town and liberties thereof. In pursuance of this Act of Parliament, a considerable part of the now existing docks, basins, quays, and conveniences were constructed.

By an Act of Parliament passed 42 Geo. III., reciting that by reason of the increase of the trade and commerce of the port of Kingston-upon-Hull, the basin or dock and the harbour of Kingston-upon-Hull were not sufficient for the reception and accommodation of the vessels belonging to and using the said port, and that it was expedient, for the greater accommodation and benefit of the trade of the said port, that an additional basin or dock should be made at the said port in the manner thereafter described, the Dock Company were empowered to make such additional dock. By a subsequent Act, passed 45 Geo. III., reciting the former Dock Acts, it was enacted, that the same rights and privileges which belonged to the then present port of Kingston-upon-Hull should be extended to the docks and basins respectively, which to all intents and purposes should be deemed and held to be part of the port of Kingston-upon-Hull; and that vessels entering into and loading or unloading in the said docks or basins should be subject to the several regulations, and liable to the several duties, to which they were or would have been liable in the port of Kingston-upon-Hull.

[ \*47 ]

The port of Hull is mentioned in existing documents \*of as early a period as the reign of King John. In the great roll of the pipe of the sixth year of that King, is an account of the fifteenths of the merchants for the seaports during a certain period: the fifteenths of Hull are there reckoned at 344*l.* 14*s.* 4½*d.* And there is also an account of the fifteenths of Scarborough, York, Selby, Barton, Grimsby, and other places. In the great roll of the pipe 9 Edw. I. is an entry of the customs of wools, skins, and leather at the port of Hull for one year, amounting to 1,086*l.* 10*s.* 8½*d.* In the roll 17 Edw. I. is another entry of the customs of wools, fells, and hides in the port of Hull. The case further stated an inquisition and extent, in the 21 Edw. I., of the

town of Wike-upon-Hull, and of the lands, tenements, &c. thereto adjacent and belonging; and it then cited entries in the Pipe Roll 28 Edw. I. of customs for wools, &c. returned by the collectors of the customs, for "The Port of Kingston-upon-Hull," and similar entries for "Kingston-upon-Hull," from the Pipe Roll 31 Edw. I.

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By letters patent 5 & 6 Ric. II. the King granted to the mayor, bailiffs, and burgesses of the town of Kingston-upon-Hull, for the improvement of the same town, to have the port below the same town lately called Sayercryk, now called Hull, for ever annexed to the town aforesaid, and liberty of the same, from Sculcotegote as far as the middle course of the water of Humber, to build, &c. for the improvement, defence, preservation, and augmentation of the town aforesaid; and Edward the Fourth made a similar grant. Henry the Sixth, in consideration that the port of the town of Kingston-upon-Hull, by the daily course of the tides and of tempests, &c. was removed further from the town than it was accustomed to be, and was likely to be still further removed, \*which would redound to the destruction of the said port, gave licence to the mayor and commonalty, &c. to purchase lands and tenements held of the Crown, whether *in capite* or otherwise, or held of other persons, to the value of 100*l.* a year, to have and hold to them and their successors for the defence, reparation, and security of the port.

[ \*48 ]

By a commission in the exchequer of the seventh year of Queen Elizabeth, commissioners were directed to make certain enquiries touching the said port of Kingston-upon-Hull, and its member ports. One of the enquiries was: "What number of creeks do belong to the said port, and how far any of them is distant from the said port, and how far any of them be distant from other, and into what shores any of the said creeks do extend?" The answer first mentioned York, and then "certain creeks in Yorkshire belonging to the port of Kingston-upon-Hull that lie northward on the sea-coast from the mouth of Humber;" namely, Hornsaye, Bridlington, Flamborough, Fylay, and Scarborough; and on the south, Grimsby in Lincolnshire; of all which places the distance from Hull was stated by land and by water.

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By another commission in the exchequer, 32 Car. II., in which his Majesty recites, that “our members of the port of Hull,” and the quays and wharfs in the said members, &c. have become unsettled, unbounded, and unlimited, and some of them formerly used are become inconvenient, and other places within the said port and members are now more commodious; commissioners are appointed to repair to the member ports of Hull, viz. Scarborough, Bridlington, and Grimsby, and to find out and assign and appoint open places there to be \*places, quays, and wharfs for the landing and shipping of goods, and to settle the limits of the said member ports, and of all such places, quays, and wharfs, and to prohibit all other places within the said member ports from being used as such quays, &c. And the commissioners certified that they had settled the limits of the said member ports accordingly.

By letters patent of 23 Eliz., a right (subsequently recognized by a charter of Charles II.) is confirmed to the corporation of the Trinity House at Hull, to levy from thenceforth for ever, at all times, within the port of the said town of Kingston-upon-Hull, and at all places within the limits and liberties thereof; that is to say, in all havens, creeks, and other places where the King’s customer of Hull, by virtue of his office, had any authority to take any custom for primage as theretofore had been received or taken in the same port of Hull, in or by the way of lodenage or lowage, primage or stowage; that is to say, 3*d.* for every ton of wine, oil, fish, and all other goods which, in any ship or vessel by sea into the port aforesaid, or liberties thereof, as before said, should be brought and laid at shore, or otherwise discharged within the said limits; and likewise 3*d.* for primage upon every ton of goods shipped or laden in any ship at the said port of Hull, or at any place within the limits thereof, as before said, to be transported from thence by sea to any other place. The same letters patent also gave jurisdiction to the said corporation of the Trinity House at Hull in matters of dispute between masters and seamen belonging to Kingston-upon-Hull, or to any place within the said liberties or limits thereof.

[ \*50 ]

The case then went on to state instances of duties \*received by the Trinity House under this patent from 1566 to 1679, for-

goods exported and imported, chiefly in Selby vessels; and also of disputes heard and determined by the same corporation between the masters and mariners of vessels belonging to Selby in 1598, 1624, and 1650; and it stated cases of the same kind to have occurred where the vessels belonged to Gainsborough and other places up the Ouse and Trent.

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The statute 26 Geo. III. c. 60, s. 19, required that all ships entitled to trade as British vessels should be registered in the ports to which they belonged, and that the name of such port should be painted on the stern of every such vessel. From the passing of that Act till lately, all vessels belonging to Gainsborough, Selby, and other places up the Trent and Ouse, have been registered at the custom-house of Kingston-upon-Hull, and have had the words Port of Hull painted on their sterns.

There is not, nor has been, as far as can be ascertained, any custom-house at Gainsborough, Selby, or elsewhere on the Trent, Ouse, or Humber, except the custom-house of Hull; and vessels navigating those rivers have been cleared by the Hull custom-house officers, who have also superintended their registry.

The only instances of foreign trade with places on the Ouse above the town of Kingston-upon-Hull since the passing of the Dock Act of 14 Geo. III. were cases of Dutch vessels coming for cargoes of lampreys, which were chiefly taken in between Goole and Selby. These vessels paid the Dock Company the dues given by the statute as on foreign voyages, though they never entered the harbour, basins, or docks, nor loaded or unloaded in the Humber. There was a similar statement respecting some vessels which sailed from Gainsborough for France \*with corn in 1817, under a Treasury order; and a Jersey vessel, which unloaded and loaded between Goole and Selby in 1809. It did not appear that any vessels loading or unloading at Scarborough, Bridlington, or Grimsby had paid dues to the Dock Company; such vessels do not clear at Hull: but such dues had been paid since (and, for any thing that appeared, before) 1810 by vessels loading or unloading at Barrow, Barton, Brigg, and other places on the Humber, though they had not entered the harbour, basins, or docks within the port of Kingston-upon-Hull.

[ \*51 ]

The officers of the customs stationed on the Humber, Trent,

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and Ouse have, before and since the Act of 14 Geo. III. (the first instance given was in 1771), been appointed by the board of customs in London, but have made their reports to the custom-house at Hull; and the seizures made by them have been there condemned and sold. An officer, when appointed, was sworn in as waiter, searcher, &c., at A. or B. in the port of Hull.

By the statute 6 Geo. IV. c. 107, s. 135, it is enacted, "That it shall be lawful for his Majesty, by his commission out of the Court of Exchequer, from time to time to appoint any port, haven, or creek in the United Kingdom, or in the Isle of Man, and to set out the limits thereof, and to appoint the proper places within the same to be legal quays for the lading and unlading of goods: provided always, that all ports, havens, and creeks, and the respective limits thereof, and all legal quays appointed and set out and existing as such at the commencement of this Act, under any law till then in force, shall continue to be such ports, havens, creeks, limits, and legal quays respectively as if the same had been appointed and set out under the authority of this Act."

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After the passing of that statute, and at the instance of the Aire and Calder Navigation Company, but without any previous writ or proceeding of *ad quod damnum*, a commission issued out of the Court of Exchequer, tested the 18th of December, 1827, directed to Charles Lutwidge, Esq., collector of the customs at the port of Hull, Thomas Rodmell, Esq., comptroller of the customs at the said port, and John Ker, Esq., purporting to appoint Goole to be a port in the United Kingdom for the import and export of goods, wares, and merchandizes; and to assign the said C. L., T. R., and J. K. to be commissioners for setting out the limits of the said port, and for appointing proper places within the same to be legal quays for the lading and unlading of goods; and to give them full power and authority to repair to the said port of Goole, and to search, find out, and survey the same, and assign and appoint the extents, bounds, and limits of the said port of Goole, and of such place or places to be quays or wharfs, &c. within the said port, and to appoint, limit, bound, and settle all those places by metes, limits, and bounds, and to set down and appoint the extent, bounds, and

limits of the said port; and to certify their proceedings accordingly to the barons of his Majesty's Court of Exchequer, in manner and at the time therein mentioned. On the 19th of January, 1828, the commissioners made their return to that commission, certifying that by virtue thereof they did, on the 11th of the same January, and at other days and times before the return of the commission, personally repair to the said port of Goole and survey the same, and under colour of the said commission they did assign and appoint certain bounds and limits of the said port of Goole, therein fully particularized, \*and did assign and appoint a certain place, therein also described, to be thereafter a lawful quay or wharf for the lading and unlading, shipping and landing of goods within the said port of Goole; which commission and certificate were afterwards inrolled in the said Court of Exchequer; since which time there have been and still are a custom-house and custom-house officers and King's warehouses at Goole.

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Upon this state of facts, the plaintiffs contended that Goole was within the limits of the port of Kingston-upon-Hull; and that the proceedings under the commission of the 13th of December, 1827, were insufficient to vary the plaintiffs' claim to dock duties.

Objections had been taken on behalf of the defendants to the admission in evidence of certain entries in the books of the Trinity House at Hull concerning the receipt of primage; and also of entries in the custom-house books as to the appointments of officers. The opinion of the Court was to be taken on these points, but it became unnecessary to determine them.

This case was argued in Hilary Term, before Lord Tenterden, Ch. J., and Parke, Taunton, and Littledale, JJ., by *Alexander* for the plaintiffs, and *Williams* for the defendants; but the most important parts of the subject were so fully gone into in the judgment, that a report of the argument will not be required. After time taken for consideration,

LORD TENTERDEN, Ch. J., in the same Term, delivered the judgment of the Court :

This case depends upon the construction of the forty-second and forty-fourth sections of the Act 14 Geo. III. \*c. 56, by

[ \*54 ]

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which the Company of the plaintiffs was established. And the question is, whether the words "port of Kingston-upon-Hull" are to be understood in the sense of locality, as denoting the particular place so named, or in a more enlarged and extensive sense, as comprising all the places and the whole district that, for some purposes of control, management, or superintendence, are within the limits of, and dependent upon or members of, a port whereof Kingston-upon-Hull is the head and chief.

It appears by the documents set forth in this case, and also by Lord Hale's treatise *De Portibus Maris*, that there were certain ports or places members of and dependent upon the port of Hull; Lord Hale mentions Scarborough, Bridlington, Grimsby, and York. By the commission issued in the seventh year of Queen Elizabeth, as abstracted in this case, it should seem that there were sixteen member ports of Hull, which must mean members of the port of Hull; and in answer to the enquiry, what number of creeks belong to the said port, the return mentions York, Hornsaye, Brydlington, Flamborough, Fylay, Scarborough, and Grimsby. The commission issued in the 32 Car. II. speaks of our members of the port of Hull, and authorizes the commissioners to repair to *our* said member ports of Hull, to wit, Scarborough, Bridlington, and Grimsby, and to set out places, quays, and wharfs for landing and shipping of goods (which are commonly called legal quays), and to settle the extents, bounds, and limits of the said member ports. It is observable, that in this commission the King speaks of the member ports as being *his* member ports, that is, as in some sense belonging to him, whereas the port of Kingston-upon-Hull, in the limited sense of

[ \*55 ] \*that word, did not belong to the King, having, as appears by this case, been long before granted to the corporation of that town. The word "creeks" used in this commission evidently means, not creeks of the sea, but creeks of ports; that is, members of or dependent upon some other port (1).

Although it is evident that there were members of the port of Hull, yet it may be difficult to say at what time any of the places became such members. There is certainly no document set forth in this case, nor any thing to be found in Lord Hale's

(1) See Hale, *De Portibus Maris*, p. 47.

treatise, to shew that they are of greater antiquity than the document set forth at length, p. 146 of the treatise, which the learned writer mentions as a statute of the 3 Edw. I. (1) and which he considers as a Parliamentary grant of the customs upon wool, skins, and leather exported, against the opinion of some writers, who have spoken of them as existing by prescription. He considers this document also as being the institution of the two officers afterwards called the collector and comptroller of the customs, and of the seal to the writing now called a cocket, denoting the payment of the duties, and of the place where the customs ought to be paid; this statute providing for one in every county, which power the Kings afterwards enlarged by appointing a seal to be kept at more than one port in a county.

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It appears by the case that there is not nor ever was, so far as the same is ascertainable, any custom-house at any place on the Trent, Ouse, or Humber except at Hull only; and, consequently, all ships requiring a clearance, sailing to or from any place on those rivers,—and probably, \*at the date of the commission in the time of Charles II., from Scarborough and Bridlington also, —must have obtained their clearance from the officers stationed at Hull; though there would be, for convenience, inferior officers, such as tide-waiters and searchers, stationed at other places, and acting in subordination to the officers at Hull; and it is stated in the case that there were such at some places.

[ \*56 ]

From all this it appears, that the port of Hull was, for the purpose of revenue, the head or chief of a very extensive district. And this also accounts for the registering of ships at Hull belonging actually not to Hull, but to other places within that district.

By the charter of the corporation of the Trinity House at Hull, referred to in the case, the corporation is to have certain payments in respect of goods brought by sea into and landed at, or shipped from, "the port of the said town of Kingston-upon-Hull, and all places within the limits and liberties thereof; that is to say, all havens, creeks, and other places where the King's customer of Hull, by virtue of his office, had any authority to take any custom by the name of primage;" and jurisdiction is given to the corporation in matters of dispute between masters and

(1) It is not printed in the statutes of the realm.

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mariners belonging to Kingston-upon-Hull, or to any place within the said limits or liberties thereof. And it appears that this jurisdiction has been exercised in some instances at Selby, a place higher up the river than Goole. I understand some question has been lately raised as to the jurisdiction of this corporation, and therefore I shall make one observation only upon this part of the evidence ; namely, that the port of the town of Kingston-upon-Hull is here evidently distinguished from places within the limits and liberties of that port, \*and that those places are so mentioned with reference to the King's customer, and denoted by the authority exercised by the customer as to taking primage. The earliest document in the case wherein Hull is mentioned as a port is the extract from the Pipe Roll in the sixth of King John, of the account of merchants of the sea-ports ; and in this account Scarborough, York, Selby, and Grimsby are separately mentioned, and without any reference to or dependence upon Hull.

In the extract from the Pipe Rolls of the 9th, 17th, 28th, and 31st Edw. I., which are accounts of the receipt of customs of wool, skins, and leathers, a very large sum is set down as having been received on this head in the port of Hull. As neither Scarborough, York, Selby, Grimsby, nor any other place that appears at any time to have been considered as member of the port of Hull, is mentioned in the case as being returned in the accounts, I take it for granted that none of those places are named ; and the omission will be perfectly consistent with the fact of an establishment of the King's officers of his customs at Hull, after the statute of the 3rd Edw. I., and may be accounted for in that manner, though it is hardly to be supposed that none of those customable articles were shipped at Scarborough or Grimsby, where it appears that merchants were established as early as the reign of King John. It is not necessary to the decision of this case to enquire, either at what period Hull first became a port, or at what time the port was granted to the corporation ; probably the port of the river Hull existed as a port before the Conquest, as Beverley appears to have done (Hale, p. 67) ; and it may be doubtful whether the port of Hull was granted to the corporation before the charter of Richard II.,

[ \*58 ]

\*though, in the dispute with the Archbishop of York, as to his

claims in relation to Beverley, of which Hale gives an account, (p. 67, &c.) the corporation claim the port under a grant of the town and borough in the 5th of Edw. III. It may be observed, however, as a matter of curiosity or history, that the name Kingston-upon-Hull appears for the first time in the Pipe Roll of the 28 Edw. I.; which agrees with the inquisition in the twenty-first year of that reign quoted in the case, and with Lord Hale's account, p. 68, of that King's exchange with the Abbot of Meaux, whereby he acquired the vill of Wyk, and then improved Sayer Creek, and also with the mention of Sayer Creek in the charter of Richard II. and Edward IV., as being the ancient name of the port.

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The conclusion to be drawn from all these documents is, that the enlarged sense of the term port of Hull, or port of Kingston-upon-Hull, is to be taken with reference only to the royal revenue and the establishment of the officers of the customs for the collection and security of that revenue, as arising in an extensive district and various places whereof the port of Hull was the head and chief.

There being then two distinct senses in which the phrase, the port of Hull, is used,—namely, one as the head port of a district wherein there were subordinate and dependent ports; and the other the limited (and this also the popular) sense, of a port situate locally on a certain river or part of a river with a town near thereto,—we are to enquire and determine in which of these two senses the phrase or name is used with regard to the rates in question in this cause.

These rates are a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to \*be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it. And it is not to be expected, generally, that a tax or burthen will be imposed upon persons who do not in any degree participate in the benefits of the measure which the tax was intended to remunerate. There may be special and particular circumstances which may make it fit for the Legislature to do this, but it is not to be expected or presumed generally.

[ \*59 ]

The rate in question is imposed as a remuneration for the expense of excavating and making a new dock or basin for the

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reception of ships at Kingston-upon-Hull. All vessels that resort to that place derive benefit from this measure; even those that do not enter the new basin or dock, but land or receive their goods at other wharfs in the haven, are benefited by it, by reason of the greater space that is left for their accommodation by the removal of other vessels into the dock or basin. Vessels that do not enter the haven, but land or take their goods at other places, derive no benefit. It appears indeed, by the case, that some vessels of the latter description have paid the rates; but the Act of Parliament on which this question arises, is much too recent to receive exposition from usage; the instances are not very numerous; and even if we suppose them to be all that could give rise to the demand before the establishment of the port of Goole, they may not unreasonably be referred to the unwillingness of a private individual to enter into an expensive contest with a corporation, and will go a very little way toward the construction of the Act.

[ \*60 ]

Upon looking at the Act itself, at its title, and at the greater part of its enactments, it will be found that they \*relate properly to the town and haven of Kingston-upon-Hull, and to measures and works to be adopted and carried on at that place. By the forty-second section of the Act, the duty or rate is imposed "upon every ship or vessel (except the King's ships, or ships in his employment,) coming into or going out of the said harbour, basin, or docks within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board, any of their cargo within the said port." In the enumeration of the rates, which are varied according to the ship's voyage, the first article is "for every ship or vessel coming to or going between the port of Kingston-upon-Hull" and some other ports therein designated. All the following articles are upon vessels coming to or going between, as expressed in some, or trading between, as expressed in others, the said port of Kingston-upon-Hull and some other port or place designated in the particular article.

Now it appears impossible to say that the second member of the sentence of general enactment as to vessels unlading or lading within the said port, can be understood in any different or more enlarged sense than the prior member of the same

sentence, to which it so manifestly refers, and which mentions vessels coming into or going out of the said harbour, basin, or docks within the port of Kingston-upon-Hull; and the articles specifying the particular rates must be understood in the same manner.

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And if we refer to the title and all the precedent parts of the Act for the interpretation of this forty-second section, as the word of reference "the said" requires us to do, we shall certainly find nothing to give a more extensive sense to the name or phrase "the port of Kingston-upon-Hull," than its local and popular sense, and much wherein it is evidently limited to that sense.

[ \*61 ]

The forty-fourth section of the Act, however, has been relied upon, and very properly so for the purpose of the argument on the behalf of the plaintiffs, as shewing that the name "Port of Kingston-upon-Hull" must be understood in its more enlarged and extensive sense. This section relates to vessels employed in the coasting trade. It is in form a proviso, and ought perhaps, in strict propriety, to be considered as an exception from the preceding section; and, therefore, as shewing the sense of the words used in that section. The answer given to this in the argument at the Bar was, that this section should be considered as introduced only *pro majori cautela*, for the satisfaction of persons engaged in the coasting trade, and the exclusion of questions that might otherwise arise in respect of their vessels.

The words of this section are, "That this Act shall not extend to charge any ship or vessel with the rates or duties aforesaid which shall come or go coastwise from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouze within the limits of the port of Hull, as now used, or to or from any other place up the said rivers or any other river which falls into the said rivers or either of them, or which shall trade between any such port or place in Great Britain and any such place as aforesaid within or up the said rivers or either of them, unless such ship or vessel shall come into or go out of the said basin or dock, or any part of the said harbour or haven called Hull haven, or shall use the said basin or dock or quays within the said harbour, or shall unlade or put on shore, or lade or take on board, any goods, &c. or any part of \*the cargo of such ship

[ \*62 ]

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or vessel within any part of the river Humber ; or to charge with the said rates or duties, or any part thereof, any such coasting ship or vessel which shall go into, or by the officers of the customs be called into, the said harbour or haven for the sole purpose of being entered or cleared at the custom-house there."

It may be observed that this section does not mention the port of Hull, like the former sections, but the limits of the port of Hull, and that a part of it relates to the unlading or lading goods in any part of the river Humber. This latter part may have been intended to prevent frauds upon the revenue of the Dock Company by the discharge or receipt of goods in the river Humber by means of barges or lighters conveying them to or from Hull ; and the former part plainly indicates a distinction between the port of Hull and the limits of the port of Hull ; and the meaning of the words "limits of the port of Hull" is explained by the charter of the corporation of the Trinity House at Hull, wherein the words "limits and liberties" are used to denote the places whereat the King's customer of Hull had authority to take any custom by the name of primage.

It appears therefore, upon consideration of the whole matter, that this forty-fourth section ought to be considered as introduced by way of caution, and to prevent doubts and questions, rather than as explanatory of or enlarging the sense in which the words "port of Kingston-upon-Hull" are to be understood in the forty-second section.

In the argument at the Bar on behalf of the defendants, reference was made to the fifty-eighth section of the 42 Geo. III. c. xci. and the sixth section of the 45 Geo. III. \*c. xlii., two Acts passed for enabling the Dock Company to make additional docks or basins ; and it is manifest that the name "port of Kingston-upon-Hull" is there used in the limited sense of locality, and as designating that port as a port on the river Hull, according to the popular meaning and acceptance of that word, which is in general the meaning of words used in an Act of Parliament not relating to matters of science, whether of law or any other science, or to matters of art on any particular subject of practical performance. Upon the whole matter, therefore, we are of opinion that the plaintiffs have failed in establishing a claim to the rates

[ \*63 ]

in question. This is the opinion of all of us who heard the argument. If there be any error in the particular course of reasoning adopted, or in any particular observation before made, that error is to be attributed to me alone.

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*Judgment for the defendants.*

# REX v. THE INHABITANTS OF SEDGLEY (1).

(2 Barn. & Adol. 65—74; S. C. 9 L. J. M. C. 61.)

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Jan. 31.  
[ 65 ]

The express mention in the statute 43 Eliz. c. 2, s. 1, of coal-mines is a virtual exclusion of all other mines, and consequently other mines are not rateable to the relief of the poor.

Whether an excavation in the earth, from which limestone is obtained, be a mine or not, is a question of fact. But where the Sessions found that the limestone was obtained and raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, and that the stratum was worked by roads and gateheads, and the stone raised to the surface by machinery, or carried under ground to a tunnel (which is the mode used in obtaining coal and ironstone), the Court held, that the property was a limestone mine, and therefore not rateable to the relief of the poor.

By a rate for the relief of the poor of the parish of Sedgley, in the county of Stafford, made the 12th of May, 1829, the Earl of Dudley was rated as the occupier and proprietor of land and lime works at 41l. 18s. 4d., being on an annual value of 1,000l. Against this rate he appealed, on the ground that he was over-rated in respect of the yearly value of the lime works and land by him occupied in the parish; and also, that under the denomination of lime works were included certain mines of limestone, for which he was \*not liable by law to be rated. The Court of Quarter Sessions quashed the rate, subject to the opinion of this Court on the following case:

[ \*66 ]

The appellant is the owner and occupier of lands in the respondent parish of Sedgley, containing certain strata of limestone, and also of the works hereinafter mentioned, by and out of which the limestone is raised. The strata of limestone under these

(1) This decision has been frequently followed, and is confirmed by the House of Lords in *Morgan v. Crawshaw* (1871) L. R. 5 H. L. 304, 40 L. J. M. C. 202. By the Rating Act,

1874 (37 & 38 Vict. c. 54), mines of every kind are now liable to the poor rate. But the case may still be cited as bearing upon the principle of construction.—R. C.

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lands lie in a sloping position, and one stratum distinct and a considerable distance from the other, in the same manner as coal, ironstone, &c. The strata frequently crop out or terminate at the surface, and deepen in the opposite direction. Those parts of the strata which cropped out or terminated at the surface were worked by the appellant and his predecessors in quarries by daylight, or open work, following the course of the strata as far as was practicable. The continuations of these strata, which were in the course of being worked at the time the rate was made, lie forty or fifty yards below the surface of the ground, and are worked in large excavations by means of pit-shafts, steam-engines, &c., in the same way as coal, ironstone, and other minerals, and no part of the limestone is now gotten in quarries or by open work. The produce is in part drawn up the pit-shafts, and in part sent off by an underground canal or tunnel.

[ \*67 ]

The only difference between these, which the appellant contends are limestone mines, and which are described in the rate as lime works, and coal and ironstone mines, is the position of the strata, the material gotten out, and the greater excavations in the former than in the latter. The only way into these mines or works is down the shafts, or through the tunnel, which is wholly underground, a great part of it being upwards \*of fifty yards below the surface of the ground, the deepest part being at its junction with that part where the limestone is gotten. The limestone is gotten in large excavations made in the direction in which the strata run; which excavations communicate by headways or gateroads with the bottom of the shafts, and the works are lighted by candles or lamps, no part being open to daylight. The working requires experience, and is carried on by persons who are brought up to the occupation, and are called limestone miners or limestone getters, as often one as the other. The limestone is conveyed along railroads, from the part of the works where it is gotten, through the gateroads; one part to the bottom of the pit-shafts, and the other part to the canal or tunnel. That which is taken to the bottom of the pit-shafts is drawn up by the steam-engines, and the other part is sent off in boats along the tunnel. By far the greater portion of the limestone gotten by the appellant is sold in its raw state to the iron-founders for

smelting iron; but a small portion, (which, by agreement is taken at a hundredth part of the whole), is burnt into lime by the appellant on his own land. There is no difficulty in finding the limestone, the pits being sunk, engines erected, and levels and tunnels made, and the mines or works opened and in operation. The profits of the appellant are certain, though subject to variations in consequence of frequent breakings off of the strata, and their being thrown into different directions: these increase the difficulty and expense of working, and render fresh openings necessary. Limestone strata were lately found and worked in an adjoining parish to Sedgley, at a depth of more than one hundred yards below the mines of coal and ironstone. The coal and ironstone, in that case, were first gotten, and afterwards the limestone was worked by means of the same pit-shafts, which were sunk down to it. "Mines of limestone" are expressly mentioned in Acts of Parliament relating to places in the neighbourhood.

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[ \*68 ]

The case was argued in Hilary Term by

*Campbell, Macmahon, and Whateley*, in support of the order of Sessions:

The property in question is not rateable; first, because, according to the true construction of the statute 43 Eliz. c. 2, all mines (except coal mines) are exempt; and the lime works described in the case are mines. That statute requires the overseers to raise a stock by taxation "of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods." Under these words, as the mention of underwood has been held to exclude woods, so the mention of coal mines has been held to exclude other mines: *The Lead Smelting Company v. Richardson* (1). The ground of the decision there was, that no other mines were mentioned in the statute, and lead mines were therefore held not to be rateable. A dictum attributed to LAWRENCE, J. in *Rex v. Inhabitants of Woodland* (2) may be cited, to shew that the exemption was limited in *The Lead Smelting Company v. Richardson*, by Lord MANSFIELD, to such mines as

(1) 3 Burr. 1341.

(2) 2 East, 164.

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[ \*69 ]

were governed by laws of their own ; but that was not the ground of decision ; and in a subsequent case, *Rex v. Cunningham* (1), which was decided while LAWRENCE, J. was still a Judge \*of this Court, iron mines were held to be exempt upon the first ground, viz. that they were not mentioned in the statute : and in *Rex v. Bilston* (2), it was taken for granted that an owner and occupier of an ironstone mine was not rateable in respect of the mine ; the point decided being that he was not rateable for an engine used for drawing water from the mine, and for no other purpose. All the cases, indeed, in which it has been decided that the lord is liable to be rated for the ore which is assigned to him out of the mines for his seignorage, are authorities in favour of this construction of the statute ; because, in those cases, the exemption of the mines was expressly recognised. It may be said that the cases referred to, being cases of metallic mines, only prove that such mines are exempt : and that it was held in *Rex v. Alberbury* (3) that lime works, and in *Rex v. Woodland* (4) that a slate quarry, and in *Rex v. Brown* (5) that clay-pits were not exempt. Those cases, however, proceeded on the ground, not that the produce was not metallic, but that the place from which it came was not a mine. The ground on which metallic mines have been held to be exempt, is equally applicable to all other mines, viz. that they are not mentioned in the statute. The exemption cannot be confined to metallic mines, if the ground of it be that coal mines, and those alone, are expressly mentioned. The effect of so limiting this exemption, would be to make the rateability of mines depend upon the progress of science ; for several substances have, in modern times, been discovered to be metallic, which were not formerly considered to be so. Thus, soda, potassium, and magnesia, and even lime, have \*lately been ascertained to be metallic substances. The property in question might, therefore, even be considered a metallic mine ; but independently of this consideration, the works in question are exempt, not in respect of the subject-matter which they produce, but in respect of their being mines. They come within the definition given by

[ \*70 ]

(1) 5 East, 478.  
(2) 5 B. & C. 851.  
(3) 1 East, 534.

(4) 2 East, 164.  
(5) 8 East, 528.

Dr. Johnson, in his Dictionary, of that word, viz. a place or cavern in the earth which contains metals or minerals. They answer the description of mines as much as the pits do, from which coal is usually dug or ironstone got. They are worked by means of pit-shafts and steam-engines, in the same way as coal, ironstone, and other minerals; they are, therefore, clearly mines. But it may be said, that inasmuch as there is a certain profit derived from these mines, the exemption does not extend to them, and *Rowls v. Gells* (1) and *Rex v. The Baptist Mill Company* (2), in which it was held that the lord of the soil, or his lessee, is liable in respect of that share of the produce of mines which has been assigned to him, may be relied upon; but those cases were decided on the ground that the shares of the lord were profits of land, and therefore rateable. In *Atkins v. Davis* (3), BULLER, J. expressly says, that lead mines are exempted, not because of their uncertainty, but because the statute mentions coal mines only; and that it was so held in the case of *The Lead Smelting Company*.

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*Shutt and Whitcombe, contra:*

All mines which yield a certain, regular, and not merely casual profit, are rateable to the relief of the poor. According to the argument urged in support of the order of Sessions, no \*buildings but houses would be rateable, because houses are the only buildings mentioned in the statute. Lands and houses are put by way of example, and therefore, shops, sheds, &c. have been held to be rateable; and one of the several queries put to the Judges in 1688 (4) was, whether shops, salt-pits, sheds, profits of a market, &c. be taxable to the poor, as well as lands, coal mines, &c. expressed in the statute? and the Judges resolved that all things which were real and in yearly revenue must be taxed to the poor. Coal mines, therefore (like houses), may be considered as having been mentioned in the statute as examples. It is by no means a well-established rule of construction of the statute 43 Eliz., that the express mention of coal mines in that statute virtually excludes all other mines. In *The Lead Smelting Company*

[ \*71 ]

(1) Cowp. 451.

(3) Cald. 315, 325.

(2) 1 M. & S. 612.

(4) Nolan's P. L. 76, n. (2).

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[ \*72 ]

v. *Richardson* (1), neither Lord MANSFIELD nor WILMOT, J. relied solely upon that ground for their judgments. The judgment of the latter proceeded, principally, on the ground that the profits were casual. Lord MANSFIELD in *Rowls v. Gells* (2), and BULLER, J. in *Rex v. Carlyon* (3), assigned that as a reason why lead mines are not rateable within the statute; and in *Rex v. Woodland* (4), LAWRENCE, J. says, that the virtual exemption of mines in the statute 43 Eliz. was confined by Lord MANSFIELD in *The Lead Smelting Company v. Richardson* to such as were governed by particular laws of their own. In *Rex v. The Baptist Mill Company* (5), Lord ELLENBOROUGH considered it to be a debateable question, whether the naming coal mines in the statute was, according to the rule *expressio unius \*exclusio ulterius*, to all intents an exclusion of other mines, or was only put for example; and he observed, that the Judges who had held it to amount to the exclusion of other mines, had generally coupled it with this reason, "that other mines were subject to risk." It is true, that in *Rex v. Cunningham* (6) the Court seem to have been of opinion that iron mines were not rateable, but there the point was not argued; for it was conceded that they were not rateable, not being named, as coal mines are, in the stat. 43 Eliz. c. 2; and in the late case of *Rex v. Bilston* (7) the point was not contested. Those cases, therefore, are not entitled to much weight. Assuming, however, that the mention of coal mines in the statute of 43 Eliz. be a virtual exclusion of other mines, it can only be of such other mines as were known at the time of the passing of that statute, and a lime mine, not being one then known, is not within the exception. Secondly, the works described in the case do not constitute a mine. Whether an excavation in the earth be a mine or not, does not depend on the depth of the pit from which the mineral is obtained, or the mode by which it is obtained, but upon the substance procured; for if stone or slate were obtained from ever such a depth, the place from which it was obtained would not be called a mine, but a quarry. If the mode of working

(1) 3 Burr. 1341.

(2) Cowp. 451.

(3) 3 T. R. 385.

(4) 2 East, 164.

(5) 1 M. & S. 612.

(6) 5 East, 478.

(7) 5 B. & C. 851.

constituted one or the other, it might be contended that, by an alteration in the works, that which had been a quarry might become a mine, though the same substance continued to be gotten; which would lead to great uncertainty and inconvenience.

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*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. in the same Term, delivered the judgment of the COURT :

[ 73 ]

We are of opinion that the property in question is not rateable, and that the decision of the Court of Quarter Sessions is right. The cases on the subject were all very properly quoted in the argument at the Bar, and, therefore, I do not think it necessary to refer again distinctly to them. I take it to be now established as law, by the several decisions, that the expression of coal mines in the statute 43 Eliz. has the effect of excluding all other mines, according to the maxim "*expressio unius.*" The *dicta* and opinions of several Judges before whom questions of this nature have been brought, may, I think, be considered as expressing the reasons by which they supposed the Legislature to have been influenced in making coal mines rateable, and coal mines only. I must confess, that much that has been thus said is by no means satisfactory to my own mind, and that I feel great difficulty in an endeavour to reconcile the several *dicta* with each other. But it is not necessary to do this. The rule of construction has been established and acted upon for a long time, and ought to be adhered to, unless we could say positively that it is wrong, and productive of inconvenience. I can find, certainly, no inconvenience in the rule; an attempt to alter or to depart from it would introduce a new subject of litigation and expense. Considering, then, as we do, the rule of construction to be established, the only remaining matter or question will be, whether the property or limestone which has been rated is properly a limestone mine; and this, perhaps, is rather a question of fact than of law. The description of the manner in which the stone in question is obtained \*and raised, namely, by sinking shafts perpendicularly down to the stratum, which lies considerably below the surface of the ground, and then working the stratum by roads and gateheads, with the necessary provision for air, and

[ \*74 ]

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raising the stone to the surface by machinery, or carrying it under ground to a tunnel, is the exact description of the present usual mode of mining; of the mode used in obtaining coal, and of the mode used in obtaining ironstone. Ironstone obtained in this manner, has been held not to be rateable; why, then, should limestone be? What difference is there between the two? The only difference that has been suggested is, that ironstone contains a quantity of metal, and is procured for the sake of the metal it contains. But, if the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way that this stone was obtained, will not be mines, nor, indeed, will coal works be mines, though, in the statute itself, they are so called. And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language. We are, therefore, of opinion that the order of Sessions must be confirmed.

*Order confirmed.*

1831.  
*Jan. 31.*

[ 78 ]

### SCOTT v. BEVAN (1).

(2 Barn. & Adol. 78—86; 9 L. J. K. B. 152.)

In an action brought in England to recover the value of a given sum Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment.

[ \*79 ]

DECLARATION on a judgment recovered by the plaintiff in the Supreme Court of Jamaica, on the 1st of October, 1827, for 1,554*l.* 16*s.* 8*d.* current money of the island of Jamaica, with interest on the said sum from the 31st of December, 1825, and also 8*l.* 19*s.* 8½*d.* \*current money for his costs. The declaration contained an averment that the damages, costs, and charges in form aforesaid recovered, at the time of the recovery thereof, were, and still are, of great value, to wit, of the value of 1,117*l.* 0*s.* 9*d.* of lawful money of Great Britain, and that the interest on the said damages, &c. amounted to a certain other

(1) Cited and applied in *Manners v. Pearson*, '98, 1 Ch. 581, 588, 592, 57 L. J. Ch. 304, 308, C. A.—B. C.

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sum, to wit, the sum of 116*l.* 18*s.* 1*d.* of like lawful money. Plea, the general issue. 1,102*l.* 7*s.* 3*d.* was paid into Court. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1829, the plaintiff proved the judgment recovered in the Supreme Court of Jamaica, and that 140*l.* currency, taking the rate of exchange at par, was equivalent in value to 100*l.* sterling, the usual mode of reducing currency into sterling being by dividing the amount by 7, and multiplying by 5. The defendant proved, that, on the 1st of October, 1827, when the judgment was obtained, and from thence to the commencement of the action, bills upon England were in Jamaica at a premium of 22½ per cent.; 100*l.* sterling, at that rate, being worth 171*l.* currency; but taking the exchange at 19 per cent. (which was 3½ per cent. less than the actual exchange,) the value of 100*l.* sterling was 166*l.* 12*s.*; and 1,836*l.* 10*s.* 8*d.*, being the amount of the principal sum recovered, and costs, together with interest at 6 per cent., from the 31st of December, 1825, to the 2nd of December, 1828, when the money was paid into Court, was, in sterling money, 1,102*l.* 7*s.* 3*d.* Lord TENTERDEN was of opinion, that in point of law 100*l.* sterling was to be considered equivalent only to 140*l.* currency, and the jury, under his direction, found for the plaintiff. A rule *nisi* had been obtained for a new trial, upon the ground that the plaintiff would only be entitled to be paid that sum \*in sterling money, which would equal the value of 1,836*l.* 10*s.* 8*d.*, Jamaica currency, at the rate of exchange between Jamaica and England at the date of the judgment, and the sum paid into Court would exceed that value. In Trinity Term last, *Sir James Scarlett* and *Hibbert* were heard against the rule, and *Campbell* and *Comyn* *contra*, and the Court afterwards ordered the case to be argued a second time by one counsel on each side. It was accordingly argued in Hilary Term by

[ \*80 ]

*Sir James Scarlett* against the rule :

The evidence given on the part of the plaintiff shews that 100*l.* sterling was in Jamaica equivalent to 140*l.* currency. 1,836*l.* 10*s.* 8*d.* currency will, then, produce 1,311*l.* 16*s.* sterling : that sum in sterling money, carried to Jamaica, would produce

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1,836*l.* 10*s.* 8*d.* currency. The defendant claims to deduct, not merely 40 per cent. from the amount of the currency recovered, but such a further sum per cent. as the plaintiff must have paid by way of premium for bills of exchange, if he had wished to draw the sum recovered by bills on England: but the plaintiff was not bound to take bills on England; if he had had his money in Jamaica he might have invested it there, in the purchase of land or goods, or he might have remitted it in specie to some other country, in which case he would only lose the amount of freight and insurance. He is entitled to recover the exact value of his debt in sterling money. The debtor cannot compel him to run a risk by receiving payment of his debt by a bill on England. If the value of a debt in Jamaica currency is to vary with the exchange with England, it may become the interest of the debtor to postpone payment until the exchange falls. He may, after compelling his creditor to sue him in Jamaica, come to this country; and then the creditor, in an action on \*the judgment, will recover a less sum than he was entitled to at first. The plaintiff, after taking the money out of Court in this country, might, as it is contended, have directed a correspondent to draw on him for the amount; but the premium upon bills on England might fall in the mean time, and then the sum recovered at the rate of exchange at the time of the judgment would be insufficient.

[ \*81 ]

(PARKE, J.: According to your argument, if a party received 100*l.* here, he would only get 140*l.* currency: yet if at that time the holder in Jamaica of a bill on London for 100*l.*, when the exchange was 19, got 162*l.* 10*s.*, then, as a bill for 100*l.* cannot be worth more than 100 sovereigns, one hundred sovereigns taken to Jamaica must produce more than 140*l.* currency.)

If the owner of 100 sovereigns wished to remit them speedily and without risk, and took a bill on a house of great credit, at ninety days' sight, he must pay a premium. The creditor here is compelled to follow his debtor to another country; he is not to be considered in the same situation as if his intention had been to receive his money in London at the time when he recovered it. A creditor, under

such circumstances, is not to be obliged to take his payment in the manner the debtor points out. Wherever the value of foreign money can be rendered in English, the rule is, for any legal purpose, to estimate it at par. In *Cockerell v. Barber* (1) there was a legacy in sicca rupees by a will in India: and it was held, that when paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance.

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*Campbell, contra* :

[ \*82 ]

The question is, what was the value of 1,836*l.* 10*s.* 8*d.* Jamaica currency in sterling money, when the judgment was recovered? whether the criterion of value be the nominal par of exchange, or the real par of exchange, that is, the market price in sterling money, which that quantity of Jamaica currency could be purchased for at the date of the judgment? That was a question of fact, and ought to have been left to the jury. The pound currency is an imaginary sum; it is represented by no coin. The real currency in Jamaica is sovereigns, Spanish dollars, and doubloons. The plaintiff is entitled to recover that sum in sterling money, which would have produced 1,836*l.* 10*s.* 8*d.* Jamaica currency. The creditor ought not to suffer any damage, nor the debtor to derive any advantage, by reason of the money being paid in England. It is not true that the defendant seeks to deduct from the sum which would otherwise be the value of the currency in sterling money the amount of premiums which would have been paid in Jamaica on bills of exchange upon England. The question being, what the value of a given sum in currency is in pounds sterling, the premium paid on bills of exchange is used only as a mode of ascertaining that value. Now the value of a sovereign in Jamaica depends on the course of exchange. If the defendant had, in October, 1825, paid the plaintiff in Jamaica 1,102 sovereigns and a fraction, the sum paid into Court, calculating (at an exchange of 19 per cent.) 100 sovereigns to produce 166*l.* 12*s.*, the sovereigns paid into Court would produce 1,836*l.* 10*s.* 8*d.* That would have discharged the debt in Jamaica; so it will in England. There cannot be a

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difference of  $22\frac{1}{2}$  per cent. between the real par and the actual exchange. The only difference \*will be the expense of freight and insurance. [The nominal par of 140*l.* to 100*l.* cannot be a just rule in this case, for there must be the same mode of calculation whether the exchange be favourable or otherwise; and the creditor ought not to be permitted to elect to take the nominal par if the exchange be favourable, and the real par if it be not. But if an action had been brought on this judgment immediately after it was given, and 100*l.* sterling would, at the then rate of exchange, have produced not 140*l.* currency, but 120*l.* only, the creditor would not then have elected to take his money at the nominal par. On the other hand, supposing an action to have been brought in Jamaica on an English judgment for 100*l.* sterling, the plaintiff would not be entitled to recover 140*l.* currency only, but such a sum in currency as would enable him to obtain 100*l.* sterling. It is impossible that 100 sovereigns, if carried to Jamaica, would be worth only 140*l.* when a premium of  $22\frac{1}{2}$  per cent. is given for bills on England. At that rate per cent., 100 sovereigns would purchase a bill for 171*l.* currency, if the sovereigns were remitted to England and drawn against, and the purchaser of the bill would pay 171*l.* currency for it. It is absurd to say, that the nominal par is in all cases the test of value. In Sweden, accounts are kept in rixdollars, which are of the nominal value of 5*s.* sterling; but the currency being depreciated, the real value is only 1*s.* 6*d.*, and 13 rixdollars and a fraction are required to represent the pound sterling. If a creditor were to sue his debtor in Sweden for 100*l.* sterling, he would be entitled to recover not 400 rixdollars (taking them at the nominal par), but as many rixdollars as would produce 100*l.* The debtor is not thereby damnified, for he must have remitted to England \*that number of dollars to pay his creditor. So the sicca rupee originally represented an English half crown, the same quantity of silver being originally in each coin, but the rupee is now so deteriorated that it is worth only 23 pence. It therefore no longer really represents a half crown, though it does so nominally in accounts. When, therefore, a balance of account is to be paid in sterling money, the question is, how much gold and silver it will take at the

[ \*84 ]

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market price to purchase a given number of rupees? So that the true value is the real and not the nominal par of exchange. In *The Earl of Dungannon v. Hackett* (1), J. S. contracted a debt in Ireland, and coming to England he was arrested here for the debt, and it was held that he must pay Irish interest; but it was also held reasonable, that as the money was now to be paid here, the plaintiff should have an allowance for the return of it out of Ireland. *Ekins v. The East India Company* (2), is to a similar effect. In *The Marchioness of Lansdowne v. The Marquis of Lansdowne* (3), a rent-charge out of Irish estates was made payable in Ireland in English currency. It was held that although the rent-charge was payable in Ireland in the currency of England, that the appointee was not entitled to have the sum transmitted to England free of the charge of conveyance and exchange; in other words, he was to have such a sum in England as would have produced the amount in Ireland. *Cockerell v. Barber* (4) is in favour of the defendant; Lord ELDON there does not refer to any nominal par, but says the current value of the rupee is to be taken at the time when the money is payable. \*Here, the only estimate of current value is to be formed from the value of bills at the time in question.

[ \*85 ]

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., in the same Term, delivered the judgment of the COURT:

This was an action on a judgment recovered in Jamaica; money was paid into Court. The question was, how the value of the sum recovered should be estimated? The plaintiff contended, it should be as 140*l.* currency to 100*l.* sterling, without regard to the rate of exchange at any particular time. The defendant, that it should be estimated according to the exchange; and the payment, upon that supposition, was more than sufficient, taking the rate of exchange at the commencement of the action, or for some time before or afterwards. The practice has probably been in favour of the plaintiff: but there is no case that decides the question. Upon the whole, we think the defendant's mode

(1) 1 Eq. Ca. Abr. 288.

(3) 21 R. R. 43 (2 Bligh, 60).

(2) 1 P. Wms. 395.

(4) 16 Ves. 461.

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of computation approximates most nearly to a payment in Jamaica in the currency of that island; though, speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion.

[ \*86 ]

The proportion of 140*l.* to 100*l.* enters into every calculation; when bills in Jamaica are at a premium, a bill drawn upon England for 100*l.* may be sold and turned into currency at Jamaica for more than 140*l.* If such bills are at a discount, a bill for 100*l.* will sell for and produce less than 140*l.* Such bills were at some premium at the time of the judgment recovered, and at all times since. And it is true, undoubtedly, that if the plaintiff should wish to send the money that he may receive under the judgment of this Court to Jamaica, \*where the money was originally due and recovered by the judgment in that island, the mode to be adopted, according to the most general and practicable, if not the only usage, would be to get some person resident in that island to draw upon him for the amount of the sterling money recovered here; and this might be done by bills drawn at the exchange, on which the defendant relies, and which is at the rate of more than 140*l.*, namely, about 160*l.* currency to 100*l.* sterling; so that a less number of hundreds of pounds sterling, than in the proportion of 140*l.* to 100*l.*, would place him in the situation of receiving his principal and interest, viz. 1,886*l.* 10*s.* 8*d.* currency in the island of Jamaica. The rule, therefore, must be made absolute for a new trial.

*Rule absolute.*

1831.  
Jan. 31.

## DOE D. THOMAS GARROD v. JOHN GARROD.

(2 Barn. & Adol. 87—97; S. C. 9 L. J. K. B. 149.)

[ 87 ]

A testator being seised in fee of freehold land, and of copyhold according to the custom of the manor (the freehold and copyhold being intermixed), devised as follows: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, and to his son if he has one, if not, to the eldest son of my nephew J. G. and to his son after him, if he has one, if not to the regular male heir of the G. family." By codicil stating that his nephew T. G. then had a son born, he gave to that son, after his father's decease, all his freehold and copyhold lands; "and to his eldest son, if he had one; but if he had no son, then to the next eldest regular male heir of the G.

family." By the custom of the manor, copyhold lands, parcel thereof, of which any tenant died seised in fee, passed by descent to the youngest son: Held, that by the will and codicil the son of T. G. took an estate tail, and that, consequently, upon his death the copyhold lands descended to the youngest son.

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EJECTMENT for certain premises at Stratford, in the county of Suffolk. At the trial at the Spring Assizes for the county of Suffolk, 1829, a verdict was found for the plaintiff, damages 1s., subject to the opinion of the Court on the following case:

The premises in question are situate at Stratford, otherwise Stratford St. Andrew, in the county of Suffolk; part thereof is parcel of the manor of Stratford, and the residue parcel of the manor of Griston, both in the said county, and held of the lords of the two manors respectively, by copy of Court roll according to the respective customs thereof. By the customs of each of the manors, lands, parcel thereof, are devisable by will, and further, by the customs of each, lands, parcel thereof, of which any tenant dies seised in fee, pass by descent to his youngest son, which youngest son is heir of such tenant according to the customs of the respective manors. No instance has been found upon the Court rolls of either manor of the admission of an heir in tail male, but there is an instance in the manor of Stratford, of the admission of a youngest son as heir in tail general; and in the manor of Griston, of the descendant of a youngest son being vouched in a customary recovery as heir of an estate in tail general to bar such entail.

On the 9th of January, 1712, at Courts then held for the said manors of Stratford and Griston respectively, John Garrod was duly admitted to the copyhold premises mentioned in the consent rule in this cause, to hold to him and his heirs according to the customs of the said manors; and he afterwards duly surrendered the said copyhold premises to the use of his will, which surrenders were at Courts held for the said manors respectively, on the 8th of April, 1729, duly presented and enrolled.

[ 88 ]

On the 10th of December, 1772, the said John Garrod, being seised as above mentioned, of the said copyhold premises, for the recovery of which this action was brought, and being also seised in fee-simple of certain freehold premises at Stratford lying intermixed with the said copyhold premises there, made

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and published his will, duly executed and attested, and therein devised as follows: "As to my worldly estate, I dispose thereof as follows: Item, I give to my nephew Thomas Garrod of Rendham, in the county of Suffolk, all my lands, houses, and tenements lying in the manors of Stratford, Carleton, and Kelsel" (comprising the premises in question), "to have and to hold during his natural life, and to his son, if he has one, if not, to the eldest son of my nephew James Garrod, during his natural life, and to his son after him, if he has one, if not, to the regular male heir of the Garrod's family, as long as there is one of them in being, and if they should be all extinct, then to the regular heir of my nephew Thomas Field's family." On the 18th of August, 1778, the testator made a codicil, duly executed and attested, to his said will as follows: "I received a letter from my nephew Thomas Garrod, my friend, of Rendham, in Suffolk, that his wife was safely \*delivered of a son; I do give and bequeath to him, after his father's decease, all my houses, lands, and tenements lying and being in Stratford, Carlton, and Kelsel" (comprising the premises in question), "both freehold and copyhold, in the county of Suffolk, and to his eldest son, if he has one; but if he has no son, then to the next eldest regular male heir of the Garrod's family, as long as there is one of them in being."

[ \*89 ]

The testator John Garrod shortly afterwards died without revoking or altering his will, except as it was altered by the said codicil, and without revoking or altering the codicil, and he left his said nephew, Thomas Garrod, him surviving. The will and codicil were duly proved, and Thomas Garrod was, at the manor Courts for Stratford and Griston, admitted to the said copyhold premises, to hold the same for his natural life, according to the form and effect of the will and codicil. Thomas Garrod died, without having made any will as to the premises in question, some time before the 9th of January, 1781, on which day, at Courts then held for the said manors, John Garrod, the son of Thomas mentioned in the codicil, was admitted to the said premises, to hold the same to him, John Garrod, according to the said will and codicil. The last-mentioned John Garrod, who was the only son and heir of Thomas, on the 21st of October,

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1802, made his will, duly executed and attested, and thereby devised all his freehold and copyhold messuages, lands, and hereditaments to Sarah his wife (who is now living), with remainders over, and, on or about the 22nd of October, 1802, he died without having altered or revoked the said will, and without having surrendered to the use of his will in either of the manors. At Courts held for the said manors \*respectively in the year 1804, Thomas Garrod the lessor of the plaintiff, then an infant of the age of two years, was admitted in fee to the premises in question as youngest son and heir, by the respective customs of the manors, of the last-mentioned John Garrod, but he has never had possession. The defendant, who is the eldest son of the last-mentioned John Garrod, entered into the premises at Michaelmas, 1826, and still holds the same. It was agreed that the Court might come to any conclusion upon the facts of this case which the jury might have formed.

[ \*90 ]

*Preston*, for the plaintiff :

Thomas Garrod's son, to whom the gift was made, took an estate tail : *Doe v. Halley* (1). There the devise was to A. for life, without impeachment of waste, remainder to his eldest son, and the heirs of such eldest son, and in default of issue male of A., then to B. ; it was held, that A. took an estate for life, remainder to his eldest son in tail, remainder to himself in tail. It will be contended, perhaps, that, by the words of this codicil, the eldest son took the fee. But the words "eldest son" in this case appear from the subsequent words to be used as denoting not an individual, but a class, viz. all the male descendants of the person to whom the gift was made. "Son," therefore, is a word of limitation, and not of purchase ; and that being so, the son of Thomas Garrod, by the devise to him and his eldest son, if he should have one, took an estate tail : *Sonday's case* (2), *Bifield's case* (3), *Robinson v. Robinson* (4), and *Mellish v. Mellish* (5), \*where all the authorities are collected. And, assuming that to be so, the estate tail (so

[ \*91 ]

(1) 8 T. R. 5.

(4) 1 Burr. 38.

(2) 9 Co. Rep. 127.

(5) 26 R. R. 436 (2 B. &amp; C. 520).

(3) Cited in 1 Vent. 231.

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far as the copyhold lands are concerned) descended to his youngest son because it is an established rule of law that where the fee-simple would go to the youngest son, an estate tail would do so likewise: Robinson on Gavelkind, 119, ed. 1822 (1), where there is no special custom to the contrary, as there was in *Chapman v. Chapman* (2).

*Biggs Andrews, contra :*

This ejectment is brought to recover copyhold land holden of manors, where by the custom it goes to the youngest son. The copyhold and freehold land lie intermixed, and the testator disposes of both by the same clause. The lessor of the plaintiff, who is the youngest son of the person last seised, is to make out that he is entitled to take the copyhold in preference to the eldest. He contends that he may take it by virtue of the devise to the person last seised and his eldest son. It is not disputed that words of purchase may be construed to be words of limitation, in order to effect the manifest intention of the testator. The intention here is clearly expressed in the will, that the eldest son of Thomas Garrod's son should take. To construe the words "eldest son" as words of limitation will have the effect of taking away the copyhold lands from the person clearly pointed out in the will. In *Sunday's* case (3), the words "issue" and "son" were both used, and the word "issue" in a will is *primâ facie* a word of limitation. In *Bifield's* case (4), the "son" was not a person expressly designated; the devise was to A., and if he died not having a son, then, &c. In *Robinson v. \*Robinson* (5), the words were "such son as he shall have," which meant all sons; and a case being there referred to, where the words were "eldest son," it was observed by way of distinction in the principal case, that it was, there, not necessarily an originally eldest son, but might be any other son who became eldest son before the contingent remainder vested. In all the cases where the words issue and son have been held to be words of limitation, that construction has been necessary in order to effect the clear intention of the testator. Here, the devise to A. and his eldest son

[ \*92 ]

(1) [5th ed. 1897, p. 94.]

(2) March, 54.

(3) 9 Co. Rep. 127.

(4) Cited in 1 Ventr. 231.

(5) 1 Burr. 58.

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is in a case where the eldest son is a person who would not take as heir. By the codicil, the testator gives the estate to the eldest son of Thomas Garrod then born, and afterwards to his (the son's) eldest son, if he has one. The defendant is that eldest son. It is impossible to give a general interpretation to words so clearly designating him. In *Lovelace v. Lovelace* (1), J. S., being seised in fee of land, devised it to J. D., and to his eldest issue male, he having no son at the time. It was adjudged no estate tail, but for life only, and it was said, if he then had a son it was all one; that a devise to one and his issue male was an estate tail, but that here the word "eldest" would not permit that construction. And it is said that, in that case, the lands were gavelkind: *Perrot's case* (2). To put precisely a similar case; suppose this was a devise to A. and his youngest son, would it be equivalent to a devise to A. and his heirs? yet here the youngest son is heir. It does not lie on the defendant to shew what estate he took; it is sufficient for him to shew that he took some estate under the will. The \*plaintiff cannot succeed unless he shews that the son of Thomas Garrod took an estate tail. But looking to the language of the will, there is ground even for contending that the son of Thomas Garrod took a fee; for the introduction of the words, "as to my worldly estate," shews an intention to pass the whole estate: *Doe v. Gilbert* (3), *Hogan v. Jackson* (4). In *Mellish v. Mellish* (5), the word "eldest" occurred, not in the devise to the son, but in that to the daughter, and it was not contended that an estate in tail female was taken. There is nothing here to shew that the testator looked further than the eldest son. It is said that he contemplated *all* the sons. That would, in effect, be introducing into the will, after "the eldest," the words "and other sons;" but they cannot be introduced, for that would prevent the words in the will from having any operation. Suppose that a fee did not pass, still there are the words "eldest son," and they must be construed according to their plain import. In all the cases cited, the particular intent of the testator had effect given to it,

[ \*93 ]

(1) Cro. Eliz. 40.

(4) Cowp. 299.

(2) Moore, 368.

(5) 26 R. B. 436 (2 B. &amp; C. 520).

(3) 3 Brod. &amp; B. 85.

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though not in the way he pointed out. But in this case, the consequence of putting the construction contended for on the will, will be to prevent the object of the testator's bounty from taking the estate. One of the objects of the testator was, that the freehold and copyhold estates should go to the same person. If the construction contended for prevail, that object will be defeated; for the eldest son will at all events take the freehold property. Besides, there is no sufficient evidence to shew that by the custom the youngest son does take an estate tail. The youngest son being vouched in the recovery is not conclusive. [ \*94 ] \*The principal question, however, is, Did the testator contemplate a class or an individual? Here he points out the individual. The estate is given expressly to the eldest son of the son of Thomas Garrod. The defendant is therefore entitled to it.

*Preston*, in reply :

The fallacy of the argument for the defendant consists in this; that it assumes that the word "son" describes an individual, but looking at the context, it evidently describes a class, viz. heirs male. The cases cited in favour of an estate in fee do not apply, because here is a clear limitation over; therefore it must be an estate for life, or in tail. In order to effect the general intent, it must be an estate-tail. *Lovelace's* case(1), if it had occurred at the present day, would have been decided otherwise. In *Dubber v. Trollop*(2), a devise to testator's first son William for life, remainder to the heirs male of his body, remainder to his second son Thomas for life, and after his death to the first heir male of his body, was held to pass an estate tail to Thomas. In *Archer's* case(3) there cited, a devise to a father for life, and after to the next heir male, and the heirs male of such heir male, was held to be only an estate for life in the first devisee; but the reason of that, as stated by Lord HALE in *King v. Melling*(4) was, that the words of limitation were annexed to the word "heir," and therefore "heir" was taken to be but *designatio personæ*; and in *Dubber v. Trollop* it is observed, that

(1) Cro. Eliz. 40.

(2) 8 Vin. Abr. 233.

(3) 1 Co. Rep. 66 b.

(4) 1 Ventr. 215.

“from hence it appears that devise to A. for life and his heir male in the singular number, and to A. for life and his heirs male, in the plural number, is the \*same; and though an express estate for life is devised, yet it shall be an estate tail.”

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[ \*95 ]

(*Andrews*: There the word was “heir;” that is a word of limitation, and the endeavour was to cut it down; here the word is “son,” which is a word of purchase.)

The testator clearly gives his freehold property in tail, and his intent was the same as to his copyhold. No argument can be derived from the division of the property. That is a consequence of law, which the testator may not have foreseen.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT, after stating the case as follows :

It is stated as a fact, in this case, that, by the custom of the manors, the youngest son takes the tenements of which his father died seised in fee-simple, and we think the extracts from the Court rolls sufficiently shew that the same son takes also by the custom the tenements of which his father died seised in tail. Indeed, without a special custom to the contrary, it seems that he who takes in one case must take in the other also, for, in each case, the estate is taken by descent. And this is conformable to the custom of gavelkind as mentioned in Robinson’s Treatise, p. 119. This is one of the cases in which a Court is called upon to construe the will of a person, who, probably, had no clear distinct view or intent in his own mind, and certainly no intent of which every part can legally take effect. The question is, what estate John, the son of Thomas Garrod, took under the will of his great uncle?

If this John took the fee, the gift over to the heir male of the Garrod family must fail, as being too remote.

If he took for life only, the remainder to his son would be contingent, and might be defeated and never \*vest, if he should think fit to destroy his own life estate before the birth of a son, though the testator certainly intended that a son should take. Indeed at the common law if he did no act, and died leaving his

[ \*96 ]

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widow enceinte of a son, the son could not take. And if the son of John is to take any estate, a similar difficulty will occur in finding what estate he is to take. If he take for life only, and the other sons are intended to take estates for life only in succession, this intention cannot have effect, because an estate for life cannot be given to a person not *in esse* in remainder after a precedent estate for life to a person not *in esse*; and if the eldest son is to take the fee, then the remainder over will be defeated in the same way as if his father, the son of Thomas, took the fee. There are no words of inheritance applied to the son of John; he cannot have an inheritable estate unless he takes by descent; and it being plainly not intended that his father John or his grandfather Thomas should take a fee, nor the estate go over to the next heir male of the Garrod family, while issue male of John should remain, the greatest chance of effecting the general intent of the testator is to hold that this John, the son of Thomas, took an estate tail. This decision, giving an estate tail to John, will be warranted by *Sonday's* case (1), cited by *Mr. Preston*.

[ \*97 ]

It is true that if John took an estate tail, it was in his power to defeat his issue and all subsequent estates; but this same consequence would happen in many of the cases in which the first taker has been held to have an estate tail, and in some in which that consequence \*had actually happened before the decision. It is true also that in the event which has happened, of this John leaving two sons, the testator's intention of keeping the freehold and copyhold together will not take effect. This, however, is a consequence of law; it is a matter that the testator never thought of; perhaps he never knew the custom; and it is a consequence that would equally follow in a course of descent, whether in fee or tail.

Upon the whole, we think John, the son of Thomas, took an estate tail, and that the lessor of the plaintiff is entitled to recover the copyhold, and the *postea* is to be delivered to him.

*Judgment for the plaintiff.*

(1) 9 Co. Rep. 127.

THE RIGHT HON. SIR LAUNCELOT SHADWELL,  
KNIGHT, *v.* HUTCHINSON.

1831.  
*Jan. 15.*

[ 97 ]

(2 Barn. & Adol. 97—99; S. C. 9 L. J. K. B. 142; S. C. at Nisi Prius,  
3 Car. & P. 615; 4 Car. & P. 333; Moo. & Mal. 350.)

It is no defence to an action for obstructing ancient lights, that the nuisance merely affects the plaintiff's right as reversioner, and that he has already, in a former action, recovered against the defendant for the same obstruction.

CASE, for obstructing the ancient window of a house, by keeping and continuing a certain roof, before then wrongfully erected, adjoining the said house, to the injury of the plaintiff's reversion. Plea, a former judgment recovered by the plaintiff against the defendant for the same grievances. Replication, that the grievances were not the same; and issue joined thereupon. On a former trial between these parties, for an injury to the plaintiff's reversion in the same premises by erecting and keeping up a roof adjoining thereto, so as to obstruct an ancient light, it was proved that the defendant had a workshop, the roof of which originally came up in a slanting direction to the wall at the back of the plaintiff's house, below the window in question; and that the defendant afterwards raised the roof so as to bring it above the window, which was thus excluded from the \*light, except such as it received from the defendant's skylight: but the obstruction might be removed in two or three days. The plaintiff then recovered nominal damages for the injury to his reversion. On the trial of the present cause before Lord Tenterden, Ch. J., at the sittings in London before last Hilary Term, it appeared that at the time when this action was brought the obstruction had neither been removed nor increased, but that the premises continued, with respect to it, in the same state as at the commencement of the former suit. The jury, under Lord TENTERDEN's direction, found a verdict for the plaintiff, with 100*l.* damages.

[ \*98 ]

*Curwood*, in Hilary Term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection. The continuance of this obstruction was no new grievance to the reversioner, though it would have been,

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under the like circumstances, to a party in possession. The LORD CHIEF JUSTICE, at the first trial, laid down as a reason in support of the plaintiff's right to recover in such an action, that if a reversioner were prevented from suing for this kind of injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. But after he has once established the right by a verdict, no difficulty of that kind, either from long continuance of the injury, or from the death of witnesses, can affect him in future. One record will as completely support his title as many.

Per CURIAM :

If the erection in the first instance was an injury to the reversion on any ground on which it can be put, the continuance must be so likewise. The continuance of the obstruction would, in fact,  
[ \*99 ] render the \*proof of title more difficult at a future time, notwithstanding the former recovery.

*Rule refused. But a rule nisi was granted for reducing the damages on affidavit of the obstruction having been abated.*

1891.  
Jan. 27.

[ 106 ]

## CROSS AND ANOTHER v. EGLIN AND ANOTHER.

(2 Barn. & Adol. 106—112; S. C. 9 L. J. K. B. 145.)

Plaintiffs agreed to purchase of defendants "about 300 quarters, more or less" (1), of foreign rye, shipped on board the *A. E.* at Hamburg, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburg. The ship brought 350 quarters, and defendants refused to deliver any part unless plaintiffs would accept the whole. The plaintiffs abandoned the contract, and brought an action to recover back a sum of money which they had paid for 300 quarters :

Held, by Lord TENTERDEN, Ch. J. and LITLEDALE, J., that by the words "about," and "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters; by PARKE, J. and PATTESON, J., that at all events it lay on the defendants

(1) On similar words in a contract, see *Cockerell v. Aucompte* (1857) 2 C. B. (N. S.) 440, 26 L. J. C. P. 194; *Moore v. Campbell* (1854) 10 Ex. 323, 23 L. J. Ex. 310; *McConnel v. Murphy* (1873) L. R. 5 P. C. 203, 21 W. R. 609.—R. C.

to shew that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed.

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*Seem*, that evidence of mercantile men as to the effect of the words "about," and "more or less," in such a contract, was not admissible.

**ASSUMPSIT.** The declaration contained the common money counts. Plea, the general issue. At the trial before Parke, J., at the York Spring Assizes, 1830, it appeared that the following contract between the plaintiffs and defendants was signed by a broker for both parties.

"HULL, 28th of January, 1829. Sold for Messrs. Eglin and Saunderson, to Messrs. William Cross & Co., about 300 quarters (more or less) of foreign rye of good merchantable quality, shipped on board the *Anna Elizabeth*, Captain P. B. Groot, at Hambro', at 38s. 8d. per quarter. Also about fifty quarters of foreign red wheat, of good and merchantable quality, per same vessel, at 72s. per quarter; both delivered in the like good condition, imperial measure, into bond at Hull, free of port and all other charges save King's duty, and subject to said vessel's arrival at this port with the goods on board, and being unsold at Hambro'; if otherwise, the buyers to be immediately advised. To be paid for by the buyer's acceptance payable in London at three months from date of invoice and delivery."

The *Anna Elizabeth* arrived at Hull with 345 quarters of rye and ninety-one of wheat. The plaintiffs allowed the defendants to draw upon them for the value of fifty quarters of wheat (as to which no dispute arose) and 300 quarters of rye; but they declined accepting the surplus quantity. The defendants kept back the whole of the grain, insisting that the plaintiffs ought, under the contract, to receive the 345 quarters of rye; and the plaintiffs, after making a formal demand of the 300 quarters of rye and fifty of wheat, gave notice that they abandoned the contract. The bill drawn upon the plaintiffs having been paid, this action was brought to recover back the amount. Evidence was offered on the trial, that where the words "more or less" are used in a contract for grain, it is contrary to the custom of merchants to require the purchaser to accept so large an excess over the amount specified as was offered by the defendants. The evidence was objected to; but the learned Judge received it,

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giving leave to the defendants to move to enter a nonsuit. The jury found for the plaintiffs. A rule was afterwards obtained, calling on the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit entered, or a new trial had, on the ground that the evidence had been improperly received.

*F. Pollock and Knowles* shewed cause in Hilary Term :

[ \*108 ]

The evidence was rightly admitted. It is true that the construction to be put upon a contract is matter for the Court, but the meaning and effect of a particular mercantile term in it must be ascertained from witnesses conversant with the subject. It was so held in *Lilly v. \*Ewer* (1), where the question turned upon the effect of the words, "sailing with convoy;" *Chaurand v. Angerstein* (2), where the words were "to sail in the month of October;" *Anderson v. Pitcher* (3), as to a warranty to sail with convoy; *Birch v. Depeyster* (4), as to the "privilege" of the master of an East Indiaman; and *Taylor v. Briggs* (5), where the term was "cotton in bales." Supposing the words "more or less" here, which are mere surplusage, to have been omitted, the jury would then have had to ascertain, on a contract for "about" 300 quarters of grain, what was a reasonable limit according to the nature of such transactions. If, however, the question be one of law, still the plaintiffs must recover; for the Court will not hold, that on a contract for a given quantity of grain, more or less, the purchaser may be called upon to take an indefinite quantity.

*J. Williams and Archbold, contra* :

The authorities cited only shew that explanatory evidence is admissible where there is a clearly established mercantile usage with respect to the application of certain terms. That may be either where the terms themselves are peculiar, or where some particular sense is attached to them beyond that which they bear in common discourse, as in the case of "sailing with convoy," or "cotton in bales." But, unless that distinctly appear, the Court will not allow the terms of a written contract to be added to or

(1) Doug. 72.

(2) 1 Peake, 61.

(3) 5 R. R. 565 (2 Bos. & P. 164).

(4) 4 Camp. 385.

(5) 2 Car. & P. 525.

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taken from by parol evidence: *Yates v. Pym* (1). Here no particular usage is shewn with respect to the words "more or less," or "about;" and the Court is as well able to judge of their effect as the jury. Taking the agreement, then, in the ordinary acceptation of the words used, it amounts to a contract for the contents of the ship *Anna Elizabeth*, and the expression "more or less" refers to the uncertain extent of the shipment. The quantity is not indefinite; for, at all events, the capacity of the ship furnishes a limit.

LORD TENTERDEN, Ch. J.:

I think it is immaterial whether this evidence was properly received or not. If it was correctly received, the verdict is right; if not, it is for the Court to put their construction on the contract; and my opinion is, that the excess of quantity in this case was greater than the terms of the agreement warranted. It is said that the effect of the words "more or less" was limited by the capacity of the vessel mentioned; and if any expression had been used, importing that the plaintiffs were to receive all that could come by that vessel, or the whole cargo of that vessel, the suggestion might have had great weight. But this is left quite uncertain: the parties may have meant all that could come by the *Anna Elizabeth*, or all that the correspondent of Eglin and Saunderson could send by that ship, some part of it being filled with the goods of other persons; or they may have meant the remainder of the cargo after part had been sold. The terms are so uncertain, that I can see no other limit to the excess of quantity than such as we may put upon it by our construction; and we think that limit is to be placed at less than forty-five quarters.

LITLEDALE, J.:

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There is nothing to shew that a contract for the whole cargo was intended. The parties might easily have fixed the precise amount to be purchased; but the meaning probably was, that if the quantity came to any thing near that which had been named, and there was a little excess, the plaintiffs would not inconvenience the defendants by leaving it upon their hands. In construing a conveyance or devise of land, if any ambiguity

(1) 16 R. R. 653 (6 Taunt. 446; Holt, N. P. 95).

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arises as to the thing which is to pass, it is usual to take as a guide the first description of the subject-matter. The first description here, of the thing to be purchased, is 300 quarters of rye: if it had been meant that the whole quantity on board the ship was to be taken, probably something to that effect would have been found in this part of the contract. With respect to the evidence, I think there is considerable doubt whether it was admissible: it is true such evidence is often received to explain mercantile terms; but "about" and "more or less," seem to be words of general import, and I should have much difficulty in saying that evidence ought to be received to ascertain their meaning. But if the Court is to say whether the excess in this case went beyond the real meaning of the contract, I am of opinion that it did. When land is described in conveyances, it is often mentioned as containing so many acres and roods, "be the same more or less;" but it is always understood in those cases that the excess bears a very small proportion to the amount named, a much smaller proportion than that of forty-five quarters to 300. I therefore think the plaintiffs were not bound by their contract to accept the additional quantity, and were entitled to recover back the money they had paid.

[ 111 ] PARKE, J. :

I have had some doubts on this case; but I think the defendants have made out no right to insist on the plaintiffs taking the whole of this quantity of grain. The contract is to take the cargo, or a part of the cargo, shipped on board a particular vessel coming from Hamburgh. As the precise quantity is not mentioned in the agreement, the parties must have contemplated some other criterion of the amount that was to be purchased. If this criterion could be ascertained, the words "more or less," and "about," would merely leave the question between the parties where it was; and unless there had been any fraudulent misrepresentation, the one would be bound to deliver, and the other to receive, the quantity shewn to have been actually in contemplation. I cannot help thinking that the whole amount of the cargo must have been the criterion intended; for the parties would otherwise have described the quantity more precisely.

But they may have meant the whole that the defendants were authorized to sell, or had of their own, or that had not been sold to other persons. The quantity intended should have been clearly expressed : here, by the terms used, it is left in obscurity ; and on that ground I think the defendants cannot succeed. The plaintiff has advanced his money on the faith of a contract for the delivery of goods, and he claims it back on a failure in the performance of such contract : the defendant then is called upon to shew that, as far as lay in him, it was fulfilled ; and as no criterion has been given, further than the words “about 300 quarters, more or less,” for ascertaining how much was to be delivered and received in execution of the contract, the defendants must suffer the consequence of this obscurity. Although, therefore, I still doubt whether the meaning \*was not that the whole contents of the ship were to be purchased, I think, under the circumstances, the plaintiffs must retain the verdict.

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PATTESON, J. :

I also have had some doubts on the construction of this contract ; but as we cannot ascertain what the criterion was by which the parties meant the quantity to be settled, we can only look to the amount actually stated ; and as the defendants are seeking to fix the plaintiffs with the purchase of a quantity exceeding that, it lies on them to establish that that larger quantity was contemplated in the contract. But failing to do this, through the obscurity of the instrument, they cannot enforce their claim ; and the plaintiffs are entitled to recover back what they have advanced.

*Rule discharged.*

## REX v. THE MASTER AND WARDENS OF THE MERCHANT TAILORS' COMPANY (1).

(2 Barn. & Adol. 115—130 ; S. C. 9 L. J. K. B. 146.)

The Court will not grant an application by members of a corporate body, for a *mandamus* to inspect the documents of the corporation, unless it be shewn that inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are

(1) Cited by LINDLEY, L. J. in *Co. (C. A. 1888) 38 Ch. D. 92, 105, 57*  
*Mutter v. Eastern and Midlands Ry.* L. J. Ch. 615, 620, 59 L. T. 119.—R. C.

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interested ; and the inspection will then only be granted to such extent as may be necessary for the particular occasion.

Where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves, or any matter then in dispute, applied for a *mandamus* to the Master and Wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the Master and Wardens, belonging to the Company or relating to its affairs, the Court discharged the rule with costs.

A RULE was obtained in Michaelmas Term, calling on the Master and Wardens of the Company of Merchant Tailors, in the city of London, and John Bamber De Mole, gentleman, their clerk, to shew cause why a *mandamus* should not issue commanding them to permit and suffer John Norman, Charles Fox Smith, Robert Hugh Franks, and two other persons named in the rule, or any of them, assisted by William Henry Ashurst, gentleman, their attorney, and agents, from time to time, at all seasonable times, to inspect and take copies of all records, books, papers, and muniments belonging to the said Company, or relating to the affairs thereof, which were in the possession, power, or controul of the said Master and Wardens, and clerk, or any or either of them.

The rule was obtained on the affidavits of the said C. F. Smith, R. H. Franks, and J. Norman, in which it was stated that the deponents had been freemen and liverymen of the Company, respectively, for eleven, ten, and twenty-one years last past ; that the Company was an ancient corporation, and possessed of great revenues, partly arising from the contributions of freemen and liverymen of the Company, for the promotion of religion and education, the relief of the poor members, and other charitable purposes : that the attention of the \*deponents had for a considerable time been called to the affairs of the Company by reports, which they believed to be well founded, that the revenues were misemployed through malpractice on the part of those members who had the management of the Company's affairs : that the fine for admitting freemen to the livery had been twice raised since 1810, without any corresponding increase (as the deponents were informed and believed) in the pensions and charitable disbursements of the Company ; that a lavish expense

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had taken place, (some instances of which the deponents alleged to be within their own knowledge) unsanctioned by the majority of the members of the Company: that a clerk of the Company had (as the deponents had heard and believed) within the last few years misappropriated funds of the Company to a large amount, but that no accounts or information had been laid before the freemen and liverymen by which they could learn the amount of such defalcation, nor could they ascertain, unless allowed to look at their charters, bye-laws, books, muniments, and documents, whether such their common funds were properly applied and accounted for or not.

The affidavits then stated various applications made during the last three or four months by the deponents, in concert with other freemen and liverymen of the Company, to the Master and Wardens, and to the clerk of the Company, for an inspection of the charters and bye-laws, which was finally refused, it being at the same time stated on behalf of the Master and Wardens, that if any of the livery wished for an interview with the Master and Wardens, or with them and the Court of Assistants, to communicate to them any thing respecting the Company \*or its affairs, a request to that effect would be complied with.

[ \*117 ]

It was further alleged in these affidavits, that the election of Master and Wardens was not made by the Company at large, but by the Master, Wardens, and Court of Assistants, which last mentioned Court was composed of liverymen, elected as vacancies occurred, by the Master, Wardens, and Court of Assistants themselves; whereas the election of Master and Wardens, by a charter of Richard II., belonged to the whole Company, and not to any select body. That the Court of Assistants, with the Master and Wardens, (amounting in all to only thirty-nine persons) exclusively managed the affairs of the Company, and were alone permitted to see the accounts, records, or ordinances of the Company; and that the members of the said Court of Assistants, were, as the deponents believed, chosen by favour.

It was also stated, that on the admission of the deponents to be freemen, they were sworn to observe certain regulations of

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the Company, and that part of the oath was as follows: "And all other good rules and ordinances made and to be made, not repealed nor reversed, you shall obey, keep, and maintain, to your power, as near as God will give you grace." And on their admission to be liverymen, a part of the oath administered was in these words, "You shall keep to your brother all the lawful ordinances and acts now ready made within your said fraternity as far as shall concern or belong to your charge."

[ \*118 ]

The deponents alleged that they had no other wish in desiring the inspection of the said charters, bye-laws, and other documents, than to see, on behalf of a body \*of the members, by whom they were authorized, how their joint funds were disbursed, and that the legal rights and privileges of the members of the Company were enjoyed by them agreeably to their charters.

The affidavits in answer were sworn by the clerk, the Master, and several of the Wardens, and the accountant of the Master and Wardens. They stated that the Company was a corporation as well by prescription as by charters of several Kings; and they referred in particular to a charter granted by Henry VII., by and with the advice and consent of the Lords spiritual and temporal in Parliament, to the then Master and Wardens of the fraternity of Tailors and Armourers of Linen Armoury of St. John the Baptist, in the city of London, and their successors, which is now the governing charter of the Company. By this charter the King incorporated, confirmed, and translated the said Master and Wardens, and their successors, by the name of the Master and Wardens of the Merchant Tailors of the Fraternity of St. John the Baptist, in the city of London, and empowered them and their successors from time to time to increase, and admit members into, the said fraternity. And the lands, tenements, and property of every description, and all liberties, franchises, privileges, and grants which the said Master and Wardens, or their successors, or the men of the said mysteries, had before held were thereby granted to the said corporation of the Master and Wardens and their successors by their own name, and they were in and by that name authorized to purchase and alien lands and possessions, to sue and be sued, and to make statutes and ordinances for the good government of the said

mysteries, and of the men of the said fraternity, when necessity should require. By the same charter, the \*guild or fraternity was in like manner incorporated anew, and by virtue of that and former charters, the members of the said fraternity as such, and by becoming freemen or liverymen of the same, are entitled to, and enjoy, many benefits and privileges in the city of London, and also become liable in the matters provided for by the charter and by legal bye-laws from time to time made, to the controul and government of the corporation of Master and Wardens.

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It was further stated, that from the date of the earliest documents down to the present time (a period of more than 340 years), there has always been a body called Assistants, elected from the liverymen and freemen, and that the elections both of Master and Wardens, and of Assistants, appear always to have been made and conducted as at present, the freemen and liverymen not interfering. Circumstances were also adduced to shew that the elections of Assistants had not, as alleged on the other side, been influenced by partiality.

It was further sworn, that the Master and Wardens (but not the fraternity) possess property to a large amount, principally bequeathed to them by former Masters, Wardens, and members of the Court of Assistants, part of which was left to their absolute disposal, and part for specific purposes, some of which are wholly unconnected with the fraternity: and they also receive fines from freemen taking up their livery, and liverymen elected to the Court of Assistants. The affidavits then went into a particular statement respecting the Company's revenues and their application, contradicting in detail the affidavits on the other side. With respect to the fines on freemen taking up their livery, they stated that the Master, Warden, and Court of Assistants possessed, \*and had frequently from the earliest periods exercised, the power of varying the amount of such fines; and that taking up the livery was now an act wholly voluntary, whereas freemen were formerly required to do it if of sufficient ability; and they explained the application of the fines at present imposed, as well on this occasion as on elections to the Court of Assistants. They stated, that, as far as appeared from the Company's records, the

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accounts of the Master and Wardens had always been audited by a committee of the Court of Assistants, who reported to the Master, Wardens, and Court, and that no interference of the freemen or liverymen had taken place, except, as it appeared, in one instance before the charter of Henry VII. : that the said accounts continued to be strictly audited, and due reports made, according to ancient custom : and that the loss sustained, as alleged on the other side, by the default of one of the Company's servants, had been borne wholly by the corporate fund of the Master and Wardens.

[ \*121 ]

It was denied that any right appeared ever to have been claimed or exercised by the freemen or liverymen of examining or taking copies of the records, books, or muniments of the Master and Wardens, except as after mentioned, and except as regarded the books of registration of apprentices and freemen, from which it was customary to grant extracts of specified names and particulars to individuals applying, on payment of a fee. Some liverymen had, in 1752, desired to inspect and take copies of the bye-laws ; and the Master and Wardens, upon a case laid before Sir Dudley Rider, then Attorney-General, were advised, on that occasion, not to grant the request ; but in order to avoid a threatened litigation \*before the Court of the Lord Mayor and Aldermen, they did at that time grant a limited permission, with an express reservation of their right to withhold it in future. And the affidavits stated, that it would be most inconvenient, and productive of great confusion and considerable additional expense, if the right of inspection now claimed were allowed to exist in a body amounting to upwards of 1,100 individuals, which is, as nearly as can be ascertained, the present number of the freemen, or even in a body of 340, or thereabouts, the present number of the liverymen, of the said fraternity, exclusive of the Master, Warden, and Court of Assistants.

There were general averments of care, diligence, and integrity on the part of the Master and Wardens in administering their affairs and those of the fraternity : and the clerk of the Company stated that he was informed and believed that the present demand was prosecuted by a small minority of the livery, and that he was also informed, and believed from the conduct

pursued, that the application was not made *bonâ fide*, but in order to furnish the parties indirectly with materials, if possible, for disturbing the established constitution of the fraternity, and impugning the election of the governing officers.

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*Sir James Scarlett, Gurney, Campbell, Coleridge, and Robert Scarlett* shewed cause in Hilary Term :

This application is quite of a new kind ; it is in the nature of a bill of discovery to ascertain whether or not there may be grounds for a *quo warranto* against some person, there being, at the time, no such proceeding commenced. The distinct incorporation of the Master and Wardens, \*stated in the affidavits, in answer to the rule, is no extraordinary institution, but is found in many guilds. The applicants in this case do not advance any specific objection or claim ; they merely say that they believe certain parties are not duly elected to the offices they hold, and that they should find proofs of it if the Court would grant a *mandamus*. The Court will not allow the writ to go on mere surmise, for the purpose of shaking titles at present unimpeached.

[ \*122 ]

The Court here called upon

*F. Pollock and Hill* in support of the rule :

There is no authority against this application. It cannot be maintained that the Master and Wardens shall raise money from the Company and refuse them all information as to their affairs. This Court surely has a discretionary power, under the circumstances that have been stated, to grant a *mandamus*, in order that the body at large may see how the fines levied upon it are disposed of. And as to the property in general, if vested in the Master and Wardens, it can only be so in trust for the whole fraternity. Besides, in this case the freemen and the liverymen are sworn to keep all rules and ordinances made and to be made within the fraternity, and they cannot know the nature and effect of these without an inspection of the Company's records and documents. The authorities as to the right of inspecting documents of this kind are collected in a note on *Rex*

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v. *The Fraternity of Hostmen in Newcastle-upon-Tyne* (1). In that case the Court said, "That every \*member of the corporation had, as such, a right to look into the books for any matter that concerned himself." In *Rex v. Babb* (2) Lord KENYON says, "For the purpose of the argument it may be admitted, that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation;" though in that case the claim to inspect was considered as limited by the subject-matter. And ASHHURST, J. there says, that if a corporator has a general right of inspection, he may apply at any time, and not wait till there is a cause in the Court before he makes that the ground of his application; only, if he apply for a general inspection of all papers merely on the ground of his having an interest in them as a member of the corporation, he must shape his application accordingly. It may be admitted that a member of a corporation may not be entitled to a *mandamus* for the discovery of all documents relating to its affairs, as in the case of the Bank of England accounts, *Rex v. The Governor, &c. of the Bank of England* (3); but here the parties only seek to know the extent of their own rights and duties as full brothers of this fraternity. If there are any documents that relate to the Master and Wardens exclusively as such, they can be kept back: it is not sworn that there are none which concern the Company in general. In the cases where copyholders have applied for a *mandamus* to inspect and take copies of the Court-rolls, this Court has granted the application without waiting for a suit to be commenced: *Rex v. Lucas* (4), *Rex v. Tower* (5).

[ 124 ] LORD TENTERDEN, Ch. J. :

Since I have had the honour of a seat on this bench, I have always thought that the power and authority of the Court were limited by the practice of our predecessors, and I have been anxious not to assume or be a party to assuming any authority for the exercise of which I could find no precedent. For this reason, when my attention was called to the terms of the present

(1) 2 Stra. 1223.

(2) 3 T. R. 579.

(3) 2 B. & Ald. 620.

(4) 10 R. R. 283 (10 East, 235).

(5) 16 R. R. 428 (4 M. & S. 162).

rule, which demands an inspection, and liberty to take copies, of all records, books, papers, and muniments belonging to this Company, or relating to its affairs, I asked early in the discussion, if there were any precedent for granting a *mandamus* under such circumstances, my general recollection being that there was not, but that in all the cases where a *mandamus* had been granted, the application had been limited by some legitimate and particular object, in which the party had an interest. The cases which have been cited are no authority for this application: reliance has indeed been placed on some expressions of a general nature occurring in them; but general words, whether uttered by a Judge in Court, or spoken elsewhere, or published in a treatise, must, on sound principles of logic and criticism, be limited to the subject-matter on which they are employed: the attempt to carry them further only leads to error. In *Rex v. The Hostmen of Newcastle* (1) a question was depending as to the right of a party to be admitted into the Company, and it was material to ascertain whether the Master whom that party had served, had been admitted to his freedom in the corporation at large; a rule was prayed for generally on his behalf, to \*inspect the corporation books, and the Court said that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though in a dispute with others; but they limited the rule to the book wherein admissions of freemen were entered. And so I believe in all the subsequent cases of the same kind, it will be found that the *mandamus* has been limited to the inspection of particular documents which related to a subject then in discussion, and in which the party applying had an interest. In *Rex v. Tower* (2), which was the case of a copyholder, there was indeed no suit depending, but what were the facts? A distinct controversy had arisen between Lord St. Vincent, as tenant of a manor, and the defendant, as lord, on a particular subject, the cutting of underwood. On the Earl's application under these circumstances, the Court granted a *mandamus* to inspect the Court-rolls, so far only as related to that subject. Lord ELLENBOROUGH there said, "The copyhold tenant claims a right to the

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(1) 2 Stra. 1223.

(2) 16 R. R. 428 (4 M. &amp; S. 162).

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underwood, against which the lord sets up a counter-right, and the lord has the custody of the muniments which contain the evidence of the manorial rights. And shall he, who is a trustee and guardian of the evidence of the tenants' rights, lock it up from them, and in a matter too where his own interest is in question? I do not see upon what principle of justice that is to be done." There are many instances of applications by copyholders, some, I believe, in which no suit has been depending, where questions have arisen as to the course of descent, or to customs within the \*manor, in which the party has shewn himself to have a particular interest, and the Court has granted a *mandamus* to inspect the Court-rolls, so far as related to the matter immediately in question; but I do not know that any case can be mentioned which goes further. In *Rex v. Allgood* (1), a freehold tenant of a manor applied for a *mandamus* to enable him to inspect the Court-rolls and take copies of them, merely stating in his affidavit that he was such freehold tenant, that he had occasion to inspect the Court-rolls, and that the inspection had been denied him. But the Court there were of opinion that unless there were some cause depending, the tenant had no right to call for the inspection, and they observed that in each of the cases cited in support of the rule (2), there was some cause or proceeding instituted. The party there did not shew any particular occasion with reference to which the inspection should be granted, and the Court refused to interfere. There appears, therefore, to be no instance in which a rule has been granted like that now applied for.

The object of the present application is an inspection of all documents. It is contended that that liberty may be claimed at any rate as to some; those particularly which regard the funds of the Company. And it is said, admitting that those funds are vested in the Master and Wardens, they can only be vested in them as trustees for the fraternity. Be it so; this is not a Court in which a cestui que trust can call upon his trustee for an account, or an inspection of deeds. Again, it is said that the fines now exacted on the admission of liverymen \*form a

(1) 4 R. R. 574 (7 T. R. 746).

T. R. 141), and other cases there

(2) *Rex v. Shelley*, 1 R. R. 673 (3 referred to.

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ground for this application. As far as I have means of judging, the persons who pray for this rule must all have paid those fines already. If they are exorbitant, and a party applying to take up his livery is refused admission unless he will pay such exorbitant demand, there a particular grievance arises, and the party may apply to this Court; in such a case there would be good ground at least for a rule to shew cause; I do not say what would be the result of the application, but it would be in the ordinary course. Then it is said the terms of the oaths taken by freemen and liverymen of this Company form a reason for granting an inspection of the ordinances to which the oaths refer. I do not say that, if a distinct application were made to the Company for an inspection of those ordinances, and were refused, this Court would deny a *mandamus*; that case is not now before us; but the opinion of the Court on the matter at present in question would be no reason for refusing such a rule. The ground of our present decision is, that there is no instance of such an application as this having been granted. Nor can I see any good reason for allowing particular members of a body corporate to inspect every document belonging to such body. I am sure it would lead to great inconvenience and much expensive litigation. The rule must, therefore, be discharged.

LITTLEDALE, J. :

I am of the same opinion. The Master and Wardens, who have the care of the documents in question, are bound to produce them if a proper occasion is made out, in a matter affecting the members of the corporation. But I think the members have no right on speculative grounds to call \*for an examination of the books and muniments, in order to see if by possibility the Company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged; and then the question will arise whether or not the Court will grant a *mandamus*. The language of the Court in *Rex v. The Hostmen of Newcastle* (1), "that every member of the corporation had, as such, a right to look into the books for any matter that

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(1) 2 Stra. 1223.

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concerned himself," must be taken with reference to the case then before the Court. A proceeding was there instituted in which the party applying was concerned; a necessity for the inspection was pointed out; and the Court confined the rule to the particular book to which the necessity applied. It has indeed been held that the lord of a manor was bound to produce the Court-rolls even where there was no legal proceeding instituted; but the reason of this is, that the lord has the custody, as a trustee, of the title-deeds and documents which shew the rights of each particular tenant, instead of their being allowed the custody of their own muniments; every one, therefore, has a claim, on any dispute with the lord, or question otherwise arising with regard to his own estate, to resort to the Court-rolls for the purpose of seeing how the admissions have gone on former occasions on the particular estate, what are the customs of the manor affecting it, and whether he enjoys the privileges properly belonging to it: it is convenient that the evidences of titles and customs should be kept in one place, but it would be unreasonable if the tenants had not recourse to them. \*But even in the case of Court-rolls, the tenant has not a right to inspect all the titles; it would be extremely inconvenient if he could do so; and it would also be very inconvenient in a corporation if every member could inspect all the books without a definite view to any right or object of his own. If the Master and Wardens here have been improperly elected, the parties moving for this rule may apply for a *quo warranto*, but I think they have no right to call for an inspection of the books merely to see whether they can then find any ground for further proceedings.

TAUNTON, J.:

I also think this rule must be discharged. It appears to me that if the members of every corporation had a right on mere speculative grounds to call upon the governing part of the body for an inspection of all the records, books, and muniments belonging to it, the consequences would be endless confusion and inconvenience. It is admitted that no case can be found in which an application like this has been successfully made; and in the absence of authorities, I think this Court ought not to

establish such a precedent. There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute, between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary. If in making this application, any such purpose could have been pointed out, the parties also shewing that they had an interest in the matter in question, the rule might have been granted. And the \*present decision will not prevent our granting a remedy in future, if any particular grievance should be stated, and the parties interested, after applying without success to the corporation for a view of documents tending to throw light on the subject in dispute, should come to this Court for a *mandamus*. The application might then be granted consistently with the usage of the Court: in the present instance it cannot.

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MERCHANT  
TAILORS'  
COMPANY.

[ \*130 ]

PATTESON, J. :

I am also of opinion that the rule must be discharged, and I come to that conclusion from the generality of its terms. I am far from saying that there may not be particular instances in which a corporator may apply for a *mandamus* to inspect documents, or some of them, of the kind here mentioned, if he can shew a specific ground of application, and that the granting of it is necessary to prevent his suffering injury, or to enable him to perform his duties. But he must state a definite object; and here that is not done. It is admitted that the Master and Wardens are the governing part of this Company: if they are trustees for the rest of the members, and have abused that trust, this Court is not the jurisdiction to which abuses of such a kind are to be referred. It seems to me that the application is a great deal too large in its terms, and must therefore be dismissed.

LORD TENTERDEN, Ch. J. :

The rule must be discharged with costs, because where parties make an entirely novel application, in which they fail, they ought to pay the expense of it.

*Rule discharged with costs.*

1831.  
April 16.

[ 145 ]

## REX v. THE JUSTICES OF SALOP.

(2 Barn. & Adol. 145—149; S. C. 9 L. J. M. C. 111.)

Guardians and directors of the poor were incorporated by statute, and were thereby ordered to hold certain Courts and meetings, at which any ratepayer might object to their proceedings or accounts, and such objection should be taken into consideration; and if the matter could not at that time be settled to the satisfaction of the complaining party, it should be adjourned to the next Court, to be there finally heard and determined.

A subsequent clause provided, that any person aggrieved by any thing done in pursuance of the Act, and for which no particular method of relief was already appointed, might appeal to the Quarter Sessions to be holden within four calendar months next after the cause of complaint should have arisen.

A ratepayer appealed to the Sessions against an order of the directors for the payment of sums due on annuities, and as interest on loans. The order had been made less than four months back, but the debts had not been incurred, nor the annuities granted within four months: Held, that the appellant was not confined to the remedy pointed out by the first-mentioned clause of the Act, and that the cause of complaint had arisen within four months.

By statute 32 Geo. III. c. 85 (local), certain persons are incorporated under the name of the guardians of the poor of that part of the parish of Whitechurch which lies within the county of Salop, and twelve of them are to be directors of the poor. It is further enacted (sections 50, 51), that the directors shall enter the contracts and other proceedings, and the receipts, payments, debts, and credits of the corporation of guardians in a book, which, on reasonable request and notice from any person paying rates, shall be produced for his inspection at any of the Courts, assemblies, or meetings of the said corporation holden pursuant to the Act; that such ratepayer may then and there "protest, and declare his objection to or observations upon" any of the charges, rates, matters, or proceedings contained in the book, and the same "shall then be heard and taken into consideration by such Court;" and if the matter of objection cannot then be settled to the satisfaction of the objecting party, it shall be adjourned to the next Court or meeting of the corporation, to be then finally heard and determined. It is afterwards provided (sect. 56), that if any person shall think himself aggrieved by any thing done in pursuance of the Act, "and for which no particular method of relief hath been already appointed," such

person may \*appeal to the justices of the peace at any General Quarter Sessions to be holden for the county "within four calendar months next after the cause of complaint shall have arisen," and the determination of the Sessions shall be final, binding, and conclusive to all intents and purposes.

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v.  
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JUSTICES OF  
SALOP.  
[ \*146 ]

At the General Quarter Sessions for Shropshire in October, 1830, John Holland, a rated inhabitant of the district mentioned in the Act, appealed against certain orders which had been made for payment of money, and certain payments which had been made and allowed, within the preceding four months, by authority of the directors. The objection alleged was, that the orders, payments, and allowances were in respect of annuities which ought not to have been granted, and of interest on parish securities for debts which had been improperly contracted. The justices, after hearing counsel on each side, refused to go into the appeal, on the grounds, first, that the statute had provided a method of relief in this case, by application to the guardians and directors at one of their meetings; and, secondly, that the annuities had been granted, and the debts on which the interest was paid had been contracted, more than four months before the Sessions. A rule was afterwards obtained, calling on the justices to show cause why a *mandamus* should not issue, commanding them to enter continuances and hear the appeal.

*F. Pollock* and *E. V. Williams* now shewed cause :

The Sessions decided rightly. The appeal is only given where no other mode of relief has been provided by the Act. For this grievance, if it be such, a remedy is provided by sect. 51, and it is expressly said there, that a matter adjourned to a second meeting of the corporation \*pursuant to that clause, shall be then finally heard and determined. The cause of complaint did not arise within four months, for the true grievance was the original borrowing of the money, not the payment of each quarter's interest or annuity: otherwise a borrowing of money, even at the distance of twenty years back, might be called in question by any person coming into the parish and charged with rates, so long as interest continued to be paid for the loan. In

[ \*147 ]

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*Short v. M'Carthy* (1), which was an action of assumpsit against an attorney for neglecting to make proper enquiries at the Bank of England respecting certain stock, when he was employed by the plaintiff so to do; it was held, that the cause of action accrued at the time of the breach of duty, and not when the injury became known to the plaintiff. The same point was decided in *Brown v. Howard* (2), where the defendant was employed to purchase an annuity for the plaintiff, and took a void security. So, in *Howell v. Young* (3), which was a similar case, the Court held, that the misconduct, and not the consequential damage, was the substantial cause of action, and that the Statute of Limitations must take effect accordingly.

*Campbell and Whately, contra :*

[ \*148 ]

The statute does not take away the appeal to the Sessions in this case, but only gives the additional privilege of going before the Court of guardians. The party is not obliged to do so. And the words, "to be then finally heard and determined," merely signify that the matter shall not be adjourned to another Court. As to the limitation of time, a parishioner burdened by the payment of annuities, \*or of interest on a loan, has a right at any time to ascertain whether such annuities were legal, or such loan valid. If the guardians kept a loan or grant of annuity private for four months, calling for no payment till that time had expired, could it be said that the ratepayer was excluded from his remedy? The cases cited do not apply; there the wrong was single, though it was committed at one time and the consequence felt at another. Here a substantive grievance arises to the rated parishioner from each of the periodical payments, by which he is burdened.

LORD TENTERDEN, Ch. J. :

I think the Sessions ought to have heard the appeal. As to the first objection; the appeal to the Sessions is given in cases for which no particular method of relief has been already appointed by the Act. But the fifty-first section merely pro-

(1) 22 R. R. 503 (3 B. & Ald. 626).

(3) 29 R. R. 237 (5 B. & C. 259).

(2) 2 Brod. & Bing. 73.

vides that a party, having any objection to the proceedings of the guardians, may, at a Court holden by them, protest and make his objection or observations, which shall be then heard and taken into consideration; and if such Court cannot then finally settle and determine the matter to the satisfaction of the party making the objection, the same shall be adjourned over to the next Court or meeting of the corporation, to be then finally heard and determined. But if they then persist in the proceeding objected to, it does not appear to me that this clause can be looked upon as giving any method of relief against their order. With regard to the time of appealing; the matter objected to is the order for payment, and the payment, of interest and annuities. That seems to me the substratum of the complaint; not the borrowing money or granting annuities. An appeal, therefore, \*within four months of the order, is in due time. What the Sessions may decide on such an appeal is another question: we have only to determine whether or not they should have heard the appeal; and I think they should.

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SALOP.

[ \*149 ]

LITLEDALE, J. :

I think the "cause of complaint" was the making the order, not the borrowing, or granting the annuities. Whatever the Sessions might determine when they came to hear the appeal, I think they ought to have heard it.

PARKE, J. :

I am of opinion that the appeal was in time, and that it is immaterial when the annuities were granted or debt incurred. The grievance is, the being burdened in respect of the payments. If this were not so, a debt might be contracted privately by the directors, and if no interest were called for till the expiration of four months, the parishioners would have lost their right of appeal.

PATTESON, J. concurred.

*Rule absolute.*

1831.  
April 19.

**SPILLER AND ANOTHER v. WESTLAKE.**

(2 Barn. & Adol. 155—158; S. C. 9 L. J. K. B. 224.)

[ 155 ]

It is no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that estate had never been conveyed.

[ \*156 ]

THIS was an action brought by the plaintiffs, as payees, against the defendant as maker, of a promissory note for 200*l.*, bearing date the 5th of September, 1829, payable on the 2nd of February, 1830. Plea, the general issue. At the trial before Taunton, J., at the last Assizes for the county of Somerset, the plaintiff having proved the note, it was contended on the part of the defendant that there was no consideration for the note, inasmuch as the money for which it was drawn was, by \*agreement, to be paid in consideration of the plaintiffs executing a conveyance of a certain estate to the defendant, which they had not done. The agreement bore the same date with the note, and its terms, as to this matter, were to the following effect. The plaintiffs in consideration of 200*l.* to them then paid or secured to be paid by the defendant, and of the further sum of 1,140*l.* to be paid to them by the defendant on the 2nd of February then next, promised to surrender and convey to the defendant an estate in the agreement described, subject to two mortgages therein mentioned, in consideration whereof the defendant agreed to pay the plaintiffs on the making and passing of such surrender and conveyance the said sum of 1,140*l.*, making, with the sum of 200*l.* that day paid or secured to be paid as aforesaid, the full consideration money agreed to be paid for the purchase of the estate. The note in question was given to secure the 200*l.* A dispute having arisen between the plaintiffs and the mortgagee as to the precise sum due to the latter, he refused, until that was settled, to convey the legal estate, and the plaintiffs were thereby prevented from assigning the legal estate to the defendant on the 2nd of February (on which day the note was payable), and informed the defendant they could not do so. The learned Judge overruled the objection, but reserved liberty to the defendant

to move to enter a nonsuit. A verdict having been found for the plaintiffs,

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*Merewether*, Serjt. now moved as above, and contended that according to *Jones v. Barkley* (1), *Phillips v. Fielding* (2), and *Glazebrook v. Woodrow* (3), the payment \*of the purchase-money and the execution and tender of the conveyance being concurrent acts, the vendor could not recover the purchase-money without having executed the conveyance, or offered to do so. The conveyance of the estate was the only consideration for the note; and that consideration having failed, the plaintiffs were not entitled to recover. If the plaintiffs had paid the 200*l.* as a deposit, they might now have recovered it back.

[ \*157 ]

LORD TENTERDEN, Ch. J. :

Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute a conveyance; but here the vendee by a distinct instrument agreed to pay part of the purchase-money on the 2nd of February. I can see no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited, the concurrent acts were stipulated for in the same instrument: here the payment of the 200*l.* (which was part only of the purchase-money) was separately provided for.

LITLEDALE, J. concurred.

PARKE, J. :

I incline to think that the defence to this action would have been maintainable, if the circumstances \*had been such that the

[ \*158 ]

(1) Dougl. 684.

(3) 4 R. R. 700 (8 T. R. 366).

(2) 2 H. Bl. 123.

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defendant, having paid the 200*l.* as a deposit, would have been entitled to recover it back, but it is perfectly clear that he could not have been so entitled as long as the contract remained open. Now here the contract remained open at the time when the action was commenced, for the plaintiffs agreed only to convey the estate subject to the two mortgages. They were never bound to convey the legal estate to the defendant, but merely the equity of redemption; and that they never had refused to convey. There can, therefore, be no rule.

TAUNTON, J. concurred.

*Rule refused.*

1831.  
April 19.

# REX v. THE LORD BISHOP OF GLOUCESTER.

(2 Barn. & Adol. 158—163; S. C. 9 L. J. K. B. 228.)

[ 158 ]

The registrars of a diocese were authorized by their patent of office (under the Bishop's hand and seal) to appoint a deputy, to be "approved of and allowed by the Bishop;" who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation and consent of the Bishop, who on being informed of it, answered that "for good and sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. The Court refused a rule *nisi* for a *mandamus* to the Bishop to admit the deputy.

THE *Attorney-General* moved for a rule to shew cause why a *mandamus* should not issue commanding the Bishop of Gloucester to admit Mr. Benjamin Bonnor to the office of deputy registrar of that diocese. The circumstances were as follows:

[ \*159 ]

The principal registrars, the Rev. Martin Benson and the Rev. R. F. Halifax, were appointed in 1784 by a patent under the hand and seal of the then Bishop, granting to them jointly and separately the two offices of principal registrars, or the registrarship, of the \*diocese, to have, hold, and enjoy the same with the profits thereof, "and to exercise and execute the said offices by themselves, or by one of them, or by a sufficient deputy or deputies of them, or one of them, to be appointed by them and to be approved of and allowed by the Bishop;" and providing that "in case the said principals should not either of them by

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themselves execute the office, and the Bishop should not approve of and allow the deputy by them or one of them named and proposed unto him, it should then be lawful for the Bishop for the time being to nominate and authorize a sufficient deputy to exercise the said offices, and to him to allot the sum of 80*l.* a year clear of all deductions arising out of the profits of the said offices, or any sum not exceeding that, as he should judge meet." The offices were granted to the two registrars for their natural lives, and that of the longest liver, in as ample manner (except what in the patent was excepted) as any of their predecessors, some of whom were named, had held the same. The patent was ratified by the Dean and Chapter.

The affidavits stated, that in the oldest patent in the registry, dated 1713, the clause requiring the Bishop's approbation, and authorizing him in the case above mentioned to appoint the deputy, did not occur, and that it was first introduced in a patent of 1736.

In November, 1830, Mr. Gardner, the then deputy registrar, after an investigation of some charges against him, resigned his office, and the registrars, by an instrument under their hands and seals, nominated, authorized, and deputed, subject to the approbation and consent of the Bishop, Benjamin Bonnor, Gentleman, for them and in their place, names, and stead, to \*do all things belonging to the office of principal registrar, and to receive all dues for their use; promising to make him the usual allowances, and to ratify his lawful acts in the premises. It did not appear that any other form or mode of appointment was customary, or that any thing further was necessary, except the approbation of the Bishop, and an authority from the Archbishop of Canterbury or the Master of the Faculties in London, to act as a notary public.

[ \*160 ]

Mr. Gardner resigned, and Mr. Bonnor consented to become deputy, on the 19th of November. On that day the registrars informed the Bishop by letter of the vacancy in the office, and that Mr. Bonnor had been nominated to it, subject to his approbation; and they requested to know his sentiments upon the subject. The appointment, in form as above mentioned, was made out on the 23rd, no answer having at that time been

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[ \*161 ]

received. On the 23rd, the Bishop wrote from London, acknowledging the letter of the 19th, (which absence from town had prevented his answering before,) and requesting to see the registrars' patent. This was sent, and at the same time a letter from the registrars informing the Bishop of the appointment made on the 23rd. On receiving these communications (November 25th) the Bishop immediately returned for answer: "I lose no time in acquainting you that for good and sufficient reasons I decidedly disapprove of Mr. Benjamin Bonnor holding the situation of deputy registrar of my diocese." And, in reply to a second letter from Mr. Halifax on the subject of the appointment, he wrote, "As you tell me that the appointment of a deputy registrar is a point at issue between us, it will be right to avoid making any further mention of it at \*present, except to say, that I by no means impeach your motives and those of your colleague in your proceedings, or in your choice of Mr. Bonnor, and I trust you will give me credit for being actuated only by feelings of duty in giving my negation to that appointment." Mr. Halifax wrote two other letters, in the last of which (December 7th) he gave some account of the charges which led to Mr. Gardner's resignation. The Bishop, in reply, expressed his surprise that such a statement should be made to him for the first time after the investigation was closed and the office vacated, and he declined then entering into any examination of that case. He added, "I cannot see the use or the propriety of our reverting to the subject of Mr. Bonnor. Had you waited even for a single day after I had seen the copy of the patent, I might perhaps have been able to satisfy you and Mr. Benson upon the grounds of my opinion relative to your nomination. As things now stand, you must perceive that you and your colleague have no right to call upon me to state my reasons for the exercise of my discretion. I have not made the least charge, reflection, or insinuation against the character of any person, and, consequently, I have nothing to explain." The registrars afterwards made a formal request to the Bishop, that he would approve the nomination or assign reasons for refusing. He declined to do either, but offered, if the appointment made without his consent were withdrawn, legal proceedings abandoned, and an explicit

admission given of his right of approving or rejecting, to take the subject into further consideration on a new appointment of Mr. Bonnor, and to state such objections as he might then still retain. This, however, was not agreed to. Mr. Bonnor himself \*addressed two letters to the Bishop, who returned answers to a similar effect with those given to the registrars; observing in one of them, that he might have expressed himself more fully on the subject if he had not heard that legal proceedings were contemplated, which rendered any further discussion improper. There were numerous affidavits of Mr. Bonnor's good character and fitness for the office.

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[ \*162 ]

The *Attorney-General* referred to the several passages of the correspondence above stated, and contended that the Bishop, though authorized to enquire into the fitness of the party nominated to be deputy registrar, and to decide upon the result of such enquiry, was not empowered to give an absolute negative to the appointment without adducing any reason, as he had claimed to do here.

(LORD TENTERDEN, Ch. J.: Is there any authority for saying, that in such a case as this we can call upon the Bishop to allege his reasons?)

In *Rex v. The Bishop of London* (1), where the Bishop had stated, as his ground for refusing to license a lecturer, that he did not approve of the gentleman appointed as a fit person, the Court granted a rule *nisi* for a *mandamus*.

(LORD TENTERDEN, Ch. J.: But it was ultimately discharged.)

The Court, at least, thought the question a fit one for some enquiry. This is an office in which the administration of justice is concerned. The registrars are answerable for their deputy; the appointment, therefore, ought not to be placed absolutely in the hands of the Bishop, as it would be if he could exercise the power now claimed.

(1) 12 R. R. 393 (13 East, 419).

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[ \*163 ]

(LORD TENTERDEN, Ch. J.: He has made no appointment.  
\*The registrars may still nominate another deputy.

PARKE, J.: There is no mode of forcing a person who has a discretionary power, to exercise his discretion in a particular manner.)

It is a question whether he has that power. The clause requiring the Bishop's approbation does not appear in patents earlier than 1736.

LORD TENTERDEN, Ch. J.:

The authority given to the registrars by this patent, is, to exercise the office by themselves or one of them, or by a sufficient deputy or deputies "to be appointed by them, and to be approved of and allowed by the Bishop." In this case he disapproves of the appointment, and he distinctly states that he has good and sufficient reasons for so doing. It is true, he says he has made no charge, reflection, or insinuation against any person's character: but he may have reasons sufficient to determine his judgment, without feeling called upon to throw out imputations. He has, by law, the power of approving or disapproving, and we cannot call upon him to exercise it in one particular way or another.

LITLEDALE, J.:

I think the rule ought not to be granted. Suppose a *mandamus* went, and the Bishop made a return assigning reasons which he, in his discretion, thought sufficient, but which we thought otherwise; what course could we take?

PARKE, J., and TAUNTON, J. concurred.

*Rule refused.*

HARRIS *v.* DREWE (1).

(2 Barn. &amp; Adol. 164—168; S. C. 9 L. J. K. B. 200.)

1881.  
*April* 19.

[ 164 ]

The right to sit in a pew may be apportioned; and, therefore, where by a faculty, reciting, "that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house;" a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house; and the dwelling-house was afterwards divided into two: Held, that the occupier of one of the two, (constituting a very small part of the original messuage,) had some right to the pew; and in virtue thereof might maintain an action against a wrongdoer.

DECLARATION stated, that the plaintiff was possessed of a messuage with the appurtenances, situate in the parish of Keynsham in the county of Somerset, and therein inhabited and dwelt with his family, and by reason thereof had, and still of right ought to have, for himself and family inhabiting the said messuage, &c. the use and benefit of a certain pew in the parish church of Keynsham aforesaid, to sit, stand, or kneel in, to hear and perform divine service; yet the defendant, well knowing the premises, &c., without the leave and licence of the plaintiff, pulled down and prostrated a part of the pew, and inclosed and separated a part from the residue thereof, and kept and continued the same so inclosed, &c. Plea, not guilty. At the trial before Taunton, J. at the last Assizes for the county of Somerset, the following appeared to be the facts of the case: By a faculty from the Bishop of Bath and Wells dated 1765, reciting "that John Emery was possessed of a messuage or dwelling-house in Keynsham, formerly called 'The Old Lamb and Lark' public-house, and that he had no seat to which he had a legal title, and had applied to have a pew in the church appropriated to him in respect of such messuage or dwelling-house, to be used by him and his family for ever, and the successive owners and occupiers of the same," the pew was granted to John Emery and his family for ever, and the owners and occupiers of the said messuage, exclusive of all other persons. Emery, and several persons who had occupied the dwelling-house \*under him, had from time to time used the pew, which was one capable of holding thirty persons. The plaintiff Harris having purchased the premises of Emery's

[ \*165 ]

(1) Cited by JESSEL, M.B. in *New- 133, 141, 46 L. J. Ch. 459, 461.—*  
*comen v. Coulson* (1877) 5 Ch. Div. B. C.

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daughter, had let the old dwelling-house to one Taylor, who occupied it at the time when the defendants, who were churchwardens, committed the act complained of in the declaration, by dividing the pew into two. The plaintiff himself lived in a house adjoining that formerly occupied by Emery. It had at one time been a summer-house and afterwards a stable attached to the old house, but was converted by Mrs. Emery, after the death of her husband, into a shop, in which she carried on business. Just before the plaintiff came to live there, a room over the kitchen, and which was part of the old dwelling-house, was laid into this building; and in the new dwelling-house, thus composed, the plaintiff lived at the time when the act complained of was done by the defendant. It was objected on the part of the defendant, that as the plaintiff did not inhabit and dwell with his family in the ancient messuage in respect of which the pew was granted, he was not entitled to recover: but the learned Judge thought, that as the plaintiff occupied part of the old house, which had been laid into the new one, the right of the pew, like a right of common of pasture(1), might be apportioned, and that the plaintiff, having some right which had been invaded by the defendants, was entitled to recover; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

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*Merewether*, Serjt. now moved accordingly:

The messuage in respect of which the pew was granted was not inhabited by the plaintiff, but by Taylor, who was entitled to the pew, if any body could claim the exclusive possession of it against the churchwardens. There is no instance where a person has been held entitled to enjoy a pew annexed to a messuage, by reason of his occupation of only a small part of that messuage; it would be most unreasonable that a party, by holding only a single room, should be entitled to the enjoyment of a pew capable of containing a large number of persons. The pew was annexed to the dwelling-house, to which the summer-house was only an outhouse or appurtenance; and the occupation of the room over the kitchen could make no material alteration in the case. Many

(1) *Wild's case*, 8 Co. Rep. 156; *Tyrringham's case*, 4 Co. Rep. 36.

doubts and disputes would be the consequence of making such nice distinctions ; for the house might be divided among numerous occupiers. The real question was, who was the substantial occupier of the house, and as such entitled to the pew?

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LORD TENTERDEN, Ch. J. :

I am of opinion the verdict was right. It appears that in 1765 a faculty was granted by the Bishop of Bath and Wells to John Emery, and the owners and occupiers of a messuage or dwelling-house of which the summer-house in question was part. The plaintiff was the owner of the whole messuage, and the occupier of the summer-house, and of one room which was part of the old dwelling-house. The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew. If those persons should become too numerous to use the pew conveniently, \*and should disagree, they must settle their differences among themselves. The churchwardens, who derived their authority from the ordinary, were mere wrongdoers.

[ \*167 ]

LITLEDALE, J. :

I am of the same opinion. The plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did, and were wrongdoers. It may certainly happen, in consequence of a house being subdivided, that three or four families may become entitled to use a pew belonging to the original messuage, and they may require more accommodation ; and a question may arise how many persons are entitled to use the pew in respect of each of the subdivisions. That is, however, a matter to be settled among the respective owners. The right to enjoy the pew was annexed to the old dwelling-house altogether. The plaintiff lives in a part of that house ; he, therefore, has some right to enjoy the pew, and may maintain an action in respect of it.

PARKE, J. :

The verdict was right. The churchwardens had no right to interfere with persons deriving title through a faculty granted by the Bishop. The whole of the premises belonged to the

HARRIS  
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[ \*168 ]

plaintiff, and part of the ancient dwelling-house was occupied by him. The right to sit in the pew belonged to those who occupied the ancient dwelling-house, which has since been converted into two. The case must be considered in the same light as if the ancient house was occupied by two families. In that case all the members of the two families would have a right to use the pew; and if they became too numerous to use it \*conveniently, they must, by some agreement among themselves, settle the mode of enjoying it. A wrongdoer has no right to interfere. Here the defendants were wrongdoers.

TAUNTON, J. :

The right of sitting in an allotted space of the church may be compared to a right of common of pasture, which may be apportioned. If a person seised of a messuage and forty acres of land, having a prescriptive right of common on a waste for all commonable cattle levant and couchant upon the messuage and forty acres, as to the said messuage and forty acres appertaining, make a feoffment to another of five acres of that land, the common is severable, because the prescription to have common on the land in which, &c. for the cattle levant and couchant on the land to which, &c. extends to the whole and every parcel. So, in this case, by the faculty, the pew was granted to John Emery and his family for ever, and the occupiers of the messuage called "The Lamb and Lark." The right, therefore, to use the pew attached to the occupier of every part and parcel of that messuage. Here, it having been proved that the plaintiff had taken a part of the ancient dwelling-house into the new one, some part of the right which appertained to the ancient dwelling-house also attached to the new one. The churchwardens were clearly wrongdoers. They were only the officers of the ordinary; and here the ordinary is precluded by the act of his predecessor.

*Rule refused.*

CURTIS AND SARAH HIS WIFE *v.* DRINKWATER.

(2 Barn. &amp; Adol. 169—172; S. C. 9 L. J. K. B. 175.)

1831.  
*April* 19.

[ 169 ]

In an action against a coach proprietor for negligence, it appeared that the plaintiff was an outside passenger for hire; that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers; and that the plaintiff, being seated with her back to the luggage, was, by a sudden jolt, thrown from the coach, and her leg was thereby broken. The learned Judge directed the jury to find for the plaintiffs, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant. The jury found for the plaintiff; and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat: Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant.

THIS was an action against the proprietor of a stage-coach employed in carrying passengers from Oxford to Leamington in the county of Warwick. The declaration stated, that the defendant received the plaintiff Sarah upon his coach as a passenger from Oxford to Leamington for a certain reward, and by reason thereof ought carefully to have conveyed her; but that he, not regarding his duty, conducted himself so negligently and unskillfully in that behalf, that, by the negligence, unskillfulness, and default of one Hemings, his servant, the plaintiff Sarah was thrown off the coach, and greatly bruised, &c., and became sick, and remained so from thence hitherto, during all which time she suffered great pain and anguish. The second count stated the injury to have arisen from the negligence of the defendant. Plea, not guilty. At the trial before Lord Lyndhurst, C. B. at the last Assizes for the county of Warwick, it appeared that the plaintiff Sarah Curtis took her seat, as an outside passenger, on the back part of the coach, having both her hands occupied so as to prevent her holding by the iron railing on the roof. It appeared \*further, that there was a considerable quantity of luggage upon the roof of the coach; that there was no iron railing between the luggage and passengers: and that the plaintiff, Sarah Curtis, being so seated on the back of the coach, with her back to the luggage, was by a sudden jerk thrown from the coach in a street in Oxford, and had her leg broken. Several witnesses proved that the plaintiff had repeatedly said the accident was not owing to any fault of the coachman but to the fact of her having both

[ \*170 ]

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[ \*171 ]

her hands full, so as to prevent her holding by the iron when the jolt took place. \* \* The learned Judge \* \* reserved liberty to the defendant to move to enter a nonsuit, if the jury should find for the plaintiff; and he directed them so to find, \*if they were of opinion that the injury sustained was occasioned by the negligence of the defendant or his servant. The jury found for the plaintiff, and stated that they so found, on account of the improper construction of the coach, and of the luggage being on the seat.

*Goulburn*, Serjt. now moved for a nonsuit or new trial :

\* \* He submitted that the verdict was not founded upon the negligence of the defendant, but upon the improper construction of the coach, whereas the declaration only charged the defendant with negligence. And he also contended, that the learned Judge ought to have left it to the jury to say, whether the plaintiff had not brought the accident upon herself by her own negligence and want of caution; and that if so, the defendant was not liable.

LORD TENTERDEN, Ch. J. :

[ 172 ]

I am of opinion there should be no rule. \* \* I think the direction of the learned Judge was perfectly right; for the malconstruction of the coach, or improper position of the luggage, would be negligence in the defendant or his servants.

The rest of the Court concurred.

*Rule refused.*

1831.  
April 20.

# JOHN BLACHFORD v. HENRY DOD AND CHARLES DOD.

[ 179 ]

(2 Barn. & Adol. 179—187; S. C. 9 L. J. K. B. 196.)

In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared, that his clients having enquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter

to defendants, demanding payment of them of the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount, and that he had instructions to adopt proceedings if the matter were not arranged in the course of the morrow; and that as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate, to answer a charge of obtaining goods under false pretences. The plaintiff served the summons and attended with his clients, and the complaint was dismissed. The defendants afterwards indicted the plaintiff for sending a threatening letter contrary to the 7 & 8 Geo. IV. c. 29, s. 8(1), and he was acquitted. On the trial in this action, the Judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:

Held, that that decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants *bonâ fide* believed that they had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendants had such reasonable cause.

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THIS was an action against the defendants for maliciously and without any reasonable or probable cause, indicting the plaintiff for knowingly and feloniously sending the defendants a threatening letter, (which was particularly set out in the indictment, and in the declaration,) with intent to extort money. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the London sittings after last Term, the following appeared to be the facts of the case: On the 5th of February, 1830, a man dressed in seaman's apparel came to the warehouse of Messrs. Blachford, who sold charts, sextants, quadrants, &c., and stated his name to be Forbes; that he was mate of a vessel called the *Malvina*, of which Messrs. Graham and Sons were owners; and that being about to sail for Malaga, he wanted a quadrant and some charts. The price was 3*l.* 13*s.*, and not having ready money to pay for them, \*he offered a note which purported to be drawn by the captain of the *Malvina* on Graham and Sons, for a month's wages. Mr. William Blachford, the partner then in the warehouse, proposed to enquire of Graham and Sons whether Forbes was the person whom he represented himself to be; upon which the latter observed that the owners did not like to be troubled, and requested that Mr. Blachford would apply to the defendants, who were ship brokers. Mr. Blachford sent to the defendants to make the enquiry, and one

[ \*180 ]

(1) Repealed, 24 & 25 Vict. c. 95, s. 1.

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of the defendants said, that he would not be answerable for payment of the note, but that he believed Forbes was mate of the *Malrina*. Messrs. Blachford then furnished Forbes with the quadrant and charts, and took from him the note on the owners for 3*l.* 13*s.* On Monday the 8th of February Messrs. Blachford were informed by Forbes that the representation made by him was false, and instructed the plaintiff, as their attorney, to write a letter to the defendants on the subject. He accordingly wrote the letter set out in the indictment. The contents were seen and approved of by Mr. W. Blachford before it was sent. It was in the following terms: "11th February, 1830. I am directed by Messrs. R. and W. Blachford of the Minories, to apply to you for the purpose of demanding a payment of 3*l.* 13*s.* for goods obtained from them through a reference from your firm, under circumstances which make it incumbent on them to bring the matter under the notice of the public, if you do not immediately discharge the amount. I have my clients' instructions to adopt proceedings if the matter be not arranged in the course of to-morrow; and as the nature of those measures will be of serious consequence to you, I hope you will see the propriety of \*preventing them by your attention hereto." On the 15th of February the plaintiff, by direction of his clients, applied to the Lord Mayor for a warrant against the defendants for aiding Forbes in obtaining goods from Messrs. Blachford under false pretences. The officer of the Lord Mayor made out a summons, which was afterwards served by the plaintiff on the defendants, calling on them to appear before the Lord Mayor on the 18th of February, to answer a charge of obtaining goods under false pretences, with intent to defraud Messrs. Blachford thereof. On that day the plaintiff, accompanying his client, appeared before the Lord Mayor, who thought the charge was not made out, and dismissed the complaint. On the 26th of February, the defendants gave the plaintiff notice that they intended to prefer a bill against him at the next Old Bailey Sessions for sending a threatening letter, contrary to the statute 7 & 8 Geo. IV. c. 29, s. 8, and at the May Sessions they preferred an indictment against the plaintiff, (which was that set forth in the declaration,) for feloniously sending the defendants a letter, threatening to

[ \*181 ]

accuse them of having obtained goods under false pretences from R. and W. Blachford, with intent, by such letter, to extort money from the defendants; and also for feloniously sending the defendants another letter, demanding money from them with menaces, &c. Upon that indictment the plaintiff was tried and acquitted. It was contended on the part of the defendants, that the letter written by the plaintiff shewed reasonable cause for instituting the prosecution; the writer's object being manifestly to threaten the defendants with public exposure by a criminal proceeding; and the letter, in its terms, importing a demand of money with menace, within the meaning of 7 & 8 Geo. IV. c. 29, s. 8. But assuming that to be doubtful \*on the face of the letter, still it was said that the purpose to obtain payment of the 3*l.* 13*s.* by accusing the defendants of having by false pretences induced Blachfords to part with their goods, appeared clearly from the language of the summons obtained from the Lord Mayor, and served upon the defendants. The plaintiff's counsel insisted that it was a question of fact to be submitted to the jury, whether the defendants believed that they had good ground for preferring the indictment; but Lord TENTERDEN was of opinion that, there being no fact in dispute, probable cause, or the want of it, was wholly a question of law; and that as there was no plausible pretext for demanding the money from the defendants, the latter had reasonable and probable cause for indicting: he therefore nonsuited the plaintiff.

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DOD.

[ \*182 ]

*Campbell* now moved for a new trial :

First, the question was, whether the defendants believed they had probable cause for indicting the plaintiff for sending the letter, and this, as a question of fact, ought to have been left to the jury. Secondly, assuming that it was a pure question of law, the facts proved shewed that they had no reasonable or probable cause for preferring the indictment. As to the first point, in *Ravenga v. Mackintosh* (1), which was an action for a malicious arrest, it was left to the jury to say whether the defendant, when he made the arrest, acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action ;

(1) 26 R. R. 521 (2 B. & C. 693).

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DOD.

[ \*183 ]

and this Court held the direction right. The defendant's motive and state of mind were the material question, and that the jury were to determine. In *Nicholson v. Coghill* (1), where the defendant had been the actor \*in putting an end to the former proceedings, viz. by voluntarily discontinuing them, and there had been a very short interval between the arrest and the abandonment of the action, the absence of probable cause, and malice on the part of the defendant, were held to be matter for the consideration of the jury. So in this case, it ought to have been left to the jury to say whether the defendants believed, at the time when they preferred the indictment, that the plaintiff was guilty of the offence for which they caused him to be indicted. The letter itself, the summons, and the notice, were evidence to go to the jury, that the defendants did not believe the charge, and that they acted from a corrupt motive. If probable cause be a pure question of law, it must admit of being propounded so as to be applicable to all cases. But, assuming it to be a mere inference of law resulting from the facts proved, the fair conclusion here is, that the defendants had no probable cause for preferring the indictment. The letter could not constitute an offence within the statute 7 & 8 Geo. IV. c. 29, s. 8, which enacts, that if any person shall knowingly send or deliver any letter demanding of any other with menaces, and without any reasonable or probable cause, any money, &c., or accusing or threatening to accuse any person of a transportable offence with intent to extort money, every such person shall be guilty of felony. Surely the plaintiff's clients had reasonable ground for demanding the money from the defendants. The plaintiff himself wrote the letter as attorney, and he did so, not for the purpose of extorting money for his own benefit, but of compelling payment to his clients of a sum which they had ground for believing the defendants ought to pay. The letter itself does not import a threat \*to indict the defendants for obtaining goods by a false pretence.

[ \*184 ]

LORD TENTERDEN, Ch. J. :

I think there ought not to be any rule. The first question is,

(1) 4 B. & C. 21.

whether I ought, under the circumstances of this case, to have decided that the defendants had or had not reasonable or probable cause for preferring the indictment against the plaintiff, or to have left that wholly or in part to the jury. Then, supposing I was at liberty to decide that point, the next question is, whether my decision was right. As to the first point, it is difficult to lay down any general rule as to the cases where the opinion of a jury should or should not be taken. I have considered the correct rule to be this: if there be any fact in dispute between the parties, the Judge should leave that question to them, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant. In this case there was not one disputed fact. The letter, which was the subject of the indictment, was written by the plaintiff, who was an attorney, at the instance of his clients, but they left it to him to frame it according to his own judgment. His professional character would not protect him from an indictment if the letter was for a purpose and with an intent contrary to law. It was sent to the defendants on the 11th of February. On the 15th of February the summons was issued for them to appear before the Lord Mayor on a charge of obtaining goods under false pretences, and on the 18th the parties (the plaintiff attending with his clients) appeared \*before the Lord Mayor, and he dismissed the complaint.

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c.  
DOD.

[ \*185 ]

There being, therefore, no fact in dispute, it becomes a pure question of law, whether, under the circumstances of this case, the defendants had reasonable or probable cause for preferring the indictment against the plaintiff. Independently of the summons and of the proceedings consequent on it, I think the fair conclusion to be drawn from the letter itself was, that it was written to obtain from the defendants a sum of money which the party claiming it had not the least pretence to demand, and if that be so, there was reasonable and probable cause for preferring the indictment. But assuming that, independently of the summons, that point may be doubtful, coupling the other facts with the summons I think there is no doubt whatever.

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DOD.

The case of *Ravenga v. Mackintosh* (1) has been relied upon, and an attempt has been made to draw a general rule from a case in its own circumstances very peculiar and specific. There it was clear from the plaintiff's case that the defendant had no demand whatever on the plaintiff for the sum for which he arrested him; the defendant, therefore, *primâ facie*, had no reasonable or probable cause for making that arrest. But his defence was that he acted honestly in arresting, because he proceeded on the opinion given him by his legal adviser, and to shew that, he gave in evidence the opinion, founded on a statement made by himself. Such a defence necessarily introduced a question of fact whether he did act honestly on the faith of the opinion which he had obtained, believing that the party might lawfully be \*arrested. That question, therefore, was unavoidably left to the jury.

[ \*186 ]

LITLEDALE, J. :

In order to raise the question of probable cause, the facts which are to enable the Judge to decide whether there be probable cause or not, must be first ascertained. In this case, therefore, it was necessary, in the first instance, to ascertain whether the letter was sent by the plaintiff. That was proved. So was the fact of the summons having issued, and served by the plaintiff, and of the parties having attended, upon that summons, before the Lord Mayor. Then what was there more to be ascertained by the jury? It was not a question of fact for them whether the defendants believed that they had good ground for indicting the plaintiff, but all the material facts being ascertained, it was for the Judge to say whether the defendants had reasonable or probable cause for so doing. It being then a question for the Judge, I think that, independently of the summons, it was sufficiently shewn that there was probable cause, but assuming that to be doubtful, the summons makes it clear.

PARKE, J. :

It having been proved that the plaintiff was the writer of the letter to the defendants, it became a question on the construction of that document, whether there was probable cause for preferring

(1) 26 B. R. 521 (2 B. & C. 693).

the indictment. I think that of itself was sufficient to justify the charge; and it was for the Judge to construe the written instrument, and to decide whether the letter did not import that the plaintiff was about to accuse the defendants of obtaining goods under false pretences. I think the fair construction of the letter is, that the \*party by whom it was written intended to make that charge against the defendants, for the writer speaks of circumstances which render it incumbent on his clients to bring the matter under the notice of the public, and of the serious consequences to the defendants if the money be not paid; and if so, it is also clear that the object in writing was to extort money from the defendants: the letter itself, therefore, afforded a reasonable ground for preferring the indictment.

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v.  
DOD.

[ \*187 ]

PATTESON, J. :

The nonsuit was right. There was no fact whatever to leave to the jury. In *Ravenga v. Mackintosh* (1), the defendant acted upon a document he had obtained from another, namely, the opinion of a professional man given on a statement which he had submitted, and a question of fact arose whether he acted honestly upon the faith of that opinion, or whether he intended it to serve as a colour for the proceedings which he contemplated. Here the question of probable cause depends on a document coming from the plaintiff himself, viz. the letter sent and written by him to the defendants; and the only question is, whether we are justified in point of law in giving to that letter the construction that it contained a threat of charging the defendants with endeavouring to obtain goods under false pretences. The defendants are threatened with serious consequences; the writer of the letter evidently refers to a criminal proceeding, and that must be a prosecution for a false pretence. I concur therefore in thinking that the letter, independently of the summons, shewed a reasonable and probable cause.

*Rule refused.*

(1) 26 R. R. 521 (2 B. & C. 693).

1831.  
April 20.  
[ 188 ]

# WILKINS AND ANOTHER v. JADIS (1).

(2 Barn. & Adol. 188—189; S. C. 9 L. J. K. B. 173; S. C. at Nisi Prius, 1 Moo. & Rob. 41.)

A presentment of a bill of exchange for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer, although at that hour the house be shut up, and no person there to pay the bill.

THIS was an action by the plaintiffs as indorsees, against the defendant, as the drawer, of a bill of exchange for 350*l.* accepted by one Townsend, payable at No. 15, Godliman Street, Doctors Commons. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Term, the only question was, whether the bill had been duly presented for payment so as to charge the drawer. Between seven and eight o'clock of the evening of the day when it became due, a notary's clerk went with it to No. 15, Godliman Street. The door of the house being shut, he rang the bell and knocked, but no answer was given. Lord TENTERDEN was of opinion that the presentment was sufficient, and a verdict was found for the plaintiff.

*Campbell* now moved for a new trial :

It may be conceded, that if the house had been open the presentment would have been sufficient. A presentment out of the hours of business to a banker in a place where, by the known custom of that place, all persons of his description leave off business at stated hours, is insufficient; but to an acceptor not so circumstanced, as an ordinary trader, it has been held that eight o'clock in the evening was not an unreasonable hour for presentment: *Barclay v. Bailey* (2), *Morgan v. Davison* (3). In both those cases, however, the house was open, and there was a servant \*of the acceptor at the place where the bill was made payable. Here the holder, by omitting to present till so late an hour, took on himself the risk of finding the house shut up, and no person to pay the bill. A presentment at twelve o'clock at night, clearly would not be sufficient.

[ \*189 ]

(1) Cited by Mr. Chalmers as an illustration of sect. 45 (3) of the Bills of Exchange Act, 1882.—R. C.

(2) 11 R. R. 787 (2 Camp. 527).

(3) 1 Starkie, 114.

LORD TENTERDEN, Ch. J. :

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v.  
JADIS.

As to bankers, it is established with reference to a well known rule of trade, that a presentment out of the hours of business is not sufficient ; but in other cases the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable ; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time.

LITTLEDALE, J. concurred.

PARKE, J. :

A bill or note must be presented for payment at the banker's in the usual hours of business, but in all other cases it must be presented at a reasonable time. I think eight in the evening was, in this case, a reasonable hour.

PATTESON, J. :

The question to be considered is, whether the bill was presented at the place appointed within a reasonable time, not whether any person was there to receive it. I think the bill in this case was presented at a reasonable hour.

*Rule refused.*

## IRVING v. RICHARDSON (1).

1831  
April 22.  
[ 193 ]

(2 Barn. & Adol. 193—197 ; S. C. 9 L. J. K. B. 225 ; S. C. at Nisi Prius, 1 Moo. & Rob. 153.)

A mortgagee effected policies at two offices on a ship, valued in each policy at 3,000*l.*, and the ship being lost, he received on the two insurances 3,700*l.* An action being brought against him by one set of underwriters to recover back their proportion of the sum paid, above 3,000*l.*, and the question being, whether the defendant had received more than the actual value of the ship, insurable and insured by him : Held, that it was properly submitted to the jury, whether, in effecting the policies, the defendant meant to insure his own interest only, or that of the mortgagor also.

ASSUMPSIT for money had and received ; plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the sittings in

(1) Cited in the judgments on both (1873) L. R. 8 C. P. 596, 609, 641, 42 sides in *Ebsworth v. Marine Ins. Co.* L. J. C. P. 305, where the Court were

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RICHARDSON.

[ \*194 ]

London after last Hilary Term, the circumstances appeared to be as follows: The defendant, Richardson, effected a policy of insurance for 2,000*l.*, on the ship *Swiftsure* valued at 3,000*l.*, with the Alliance Marine Insurance Company, on behalf of which this action was brought by the plaintiff, as chairman, pursuant to Act of Parliament. The defendant had previously insured the same vessel, valued at the same amount, with another Company for 1,700*l.* The \*ship was lost, and he received the amount of the insurances from both Companies, the Alliance not being then aware of the first insurance. It also appeared that the defendant was interested in the *Swiftsure* as mortgagee for the sum of 900*l.*, and no otherwise. This action was brought by the Alliance Company to recover their proportion of 700*l.*, the excess of the sum received by the defendant on the two policies above 3,000*l.*, which they alleged to be an over payment. On behalf of the defendant, evidence was given that the full value of the vessel exceeded the amount insured, and it was contended, that the mortgagee was therefore entitled to retain that amount, though above the valuation in either policy, to which point *Bousfield v. Barnes* (1) was cited. Lord TENTERDEN, Ch. J. thought that case not applicable to the present; there the assured sought to recover 600*l.* on a policy upon a ship valued at 6,000*l.*, and it was objected that he had already received 6,000*l.* on a policy effected with another office on the same ship valued at 8,000*l.*: and it being proved that she was really worth 8,000*l.*, Lord ELLENBOROUGH held, that he might recover the 600*l.*: but here the value stated in both policies was the same, viz. 3,000*l.*, and the defendant claimed to receive, in the whole, 3,700*l.* Lord TENTERDEN, however, left it to the jury to say whether the insurance effected by the defendant was intended to cover the defendant's own interest only as mortgagee, or that of the mortgagor also. In the latter case, if *Bousfield v. Barnes* was applicable, the defendant would have been entitled to a verdict, as the sum received by him would not have exceeded the actual value of the interest protected by the two policies.

equally divided on the question of insurable interest; and in *Allison v. Bristol Marine Ins. Co.* (H. L.

1875) 1 App. Cas. 209, 216.—R. C.  
(1) 16 R. R. 780 (4 Camp. 228).

The jury thought \*(and there was some evidence to warrant the conclusion), that the defendant only meant to insure his own interest as mortgagee; and on that ground they gave a verdict for the plaintiff for 286*l*.

IRVING  
v.  
RICHARDSON.  
[ \*195 ]

*Campbell* now moved for a new trial, on the ground of misdirection :

The defendant, as mortgagee, had a right to insure the whole value of the ship on his own account as legal owner; this was taken for granted, with respect to goods and freight, in *Smith v. Lascelles* (1); and having, in fact, insured to the extent of that value, he would have been entitled to recover the full amount in actions against the two sets of underwriters, notwithstanding the objection taken by the present plaintiffs. It ought not to have been left to the jury as a question, whether, having so insured, he did so on his own account, or on that of the mortgagor, who had merely an equitable interest.

(PARKE, J.: Does not the Register Act, 6 Geo. IV. c. 110, s. 45 (2), decide this point.)

That clause was framed *alio intuitu*; it was intended for the benefit of mortgagees, to obviate questions respecting their liability as owners, for wages, repairs, or \*the consequences of accident.

[ \*196 ]

(1) 1 R. R. 457 (2 T. R. 187).

(2) Which enacts, that when any transfer of a ship, or share or shares thereof, shall be made only as a security for the payment of debts, either by way of mortgage or of assignment to trustees for sale, an entry to that effect shall be made in the registry book and in the indorsement on the certificate of registry; "and the person or persons to whom such transfer shall be made, or any other person claiming under him or them as a mortgagee, or a trustee only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel,

share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares, so transferred, available, by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made." (See now s. 34 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60.—R. C.)

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v.  
RICHARDSON. (LORD TENTERDEN, Ch. J.: The effect of the clause may go beyond what was originally intended.)

LORD TENTERDEN, Ch. J. having read over the evidence given at the trial,

LITLEDALE, J.:

I am of opinion that this case was properly left to the jury. Before the late Registry Act the mortgagee of a ship was, in point of law, the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were. The mortgagor, now, does not cease to be an owner. In order, therefore, that the defendant in this case might not keep possession of a sum exceeding not only the value stated in the policies, but also the amount of his interest, it became necessary to ascertain what it was that he had in reality insured; and with this view it was rightly put to the jury whether, in effecting the policies, he intended to insure the whole interest in the vessel, or merely the amount of his own as mortgagor.

PARKE, J.:

I am of the same opinion. The mortgagee of a ship, at least since the statute, has a distinct interest from that of the mortgagor, to the extent, *prima facie*, of the value mortgaged. The case, therefore, was rightly left to the jury.

PATTESON, J.:

[ \*197 ] The defendant, if he had been suing on one of these policies in respect of his interest as mortgagee, must have averred that he was interested to the amount insured; and could not have recovered the \*sum here in dispute, if it had been an excess above the value mortgaged. It was, therefore, a proper question for the jury in this case whether he intended to insure that amount only, or the value of the ship to both the parties interested. •

LORD TENTERDEN, Ch. J. concurred.

*Rule refused.*

# REX *v.* THE INHABITANTS OF WIX.

(2 Barn. & Adol. 197—204; S. C. 9 L. J. M. C. 36.)

1881.  
April 23.

[ 197 ]

The Court will grant a *mandamus* to the inhabitants of a parish liable to contribute to the church rate, to meet and assemble together with the minister, to elect churchwardens.

The return to such a *mandamus* stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor: Held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad.

A RULE *nisi* had been obtained for a *mandamus* to the defendants, parishioners of the parish of Wix, in the county of Essex, liable to contribute to the church rate (1), to meet and assemble together in the vestry, with the minister of the parish, to elect and choose two fit and proper persons to be churchwardens of the parish.

*F. Pollock*, in Hilary Term, 1880, shewed cause:

The Court will not grant a *mandamus* to the inhabitants of a parish. In an *Anonymous* case (2) a *mandamus* was moved for, directed to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry in Easter week for the election of churchwardens; but the Court refused it, saying, there was no instance of such a *mandamus*; and they could not take notice who had a right \*to call the vestry, and, consequently, did not know to whom it should be directed. That is an express decision of the point by this Court. The difficulty suggested in that case applies to the present; for to whom can the writ be directed? It must be to the persons who are to obey it. The person who has assumed the office of churchwarden (3) has no power to call a parish meeting, neither has the minister nor the overseers. The persons to obey the writ (if any body is bound)

[ \*193 ]

(1) This liability is now modified by the Compulsory Church Rates Abolition Act, 1868 (31 & 32 Vict. c. 109), but this does not interfere with the machinery for assessing or receiving the church rate, except so far as relates to the recovery

thereof, s. 6. And see the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6.—R. C.

(2) 2 Str. 686.

(3) See the recital of the writ, *post*, p. 547.

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are the inhabitants at large; and as the parishioners are not a corporation, it must be directed to every individual by name who occupies rateable property in the parish, and then, by what legal means are they to be called together for the purpose of doing the act? The case of *Stutter v. Freston* (1) may be relied upon in support of the present rule. That case was in the Court of Common Pleas, a Court which has no jurisdiction in granting a writ of *mandamus*. A prohibition was there granted to the Spiritual Court, where the defendant was libelled for not appearing to take upon himself the office of churchwarden, notwithstanding he had been appointed to the office by the ordinary; and it was held, that though the parson and parishioners neglect for ever so long a time to choose churchwardens, yet the ordinary has no jurisdiction, for churchwardens were a corporation at common law, and the proper way, the Court said, "is to take a *mandamus* from the King's Bench." The question could not possibly be for the Court of Common Pleas, which had no jurisdiction, whether a *mandamus* could be granted for an election. What is there said amounts only to an *obiter dictum*, and is a mere suggestion \*of what another Court, having jurisdiction to grant the writ, would be likely to do.

[ \*199 ]

*Patteson*, *contra*, relied on *Stutter v. Freston* (1), as shewing the opinion of the Judges on the subject. The Ecclesiastical Court has clearly no jurisdiction. Where there is no other remedy, the only course is by *mandamus*. In the *Anonymous* case (2) the writ was refused, because the Court could not take notice who had a right to call a vestry.

(LORD TENTERDEN, Ch. J. : Is there any precedent of a *mandamus* to the inhabitants of a parish ?)

None has been found; but it may issue on the same principle as the inhabitants of a parish may be indicted for not repairing a highway.

(LORD TENTERDEN, Ch. J. : That is quite a different proceeding.)

If the inhabitants on an indictment for not repairing a highway

(1) Str. 52.

(2) Str. 686.

do not appear to plead, a *distringas* may issue. So here they may be attached if they do not obey the *mandamus*.

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LORD TENTERDEN, Ch. J. :

The difficulty is, to whom such a *mandamus* can be directed, and how we are to enforce obedience to the writ in case no return is made.

*Cur. adv. vult.*

On a subsequent day in the Term, Lord TENTERDEN said, that the Court had considered the case, that precedents (1) had been found for a *mandamus* to parishioners, \*and that they thought it fit the rule should be made absolute.

[ \*200 ]

*Rule absolute.*

The writ having issued directed to the parishioners, recited "that within the parish there of right ought to be two churchwardens, to be chosen in Easter week in every year by the joint consent of the minister and parishioners of the parish, if it may be; but if the said minister and parishioners cannot agree upon such a choice, then the minister of right ought to choose one of such churchwardens, and the parishioners the other. The writ then stated that the King had been informed that at a meeting holden in the vestry of the parish on Monday in Easter week, 1829, T. Scott, clerk, then being curate and minister of the parish, and the parishioners met and assembled in such vestry, could not agree upon the choice of two fit and proper persons to be churchwardens of the parish for that year, and thereupon T. Scott, so being then curate and minister of the parish, in due manner chose one J. D., a fit and proper person, to be one of the churchwardens of the parish, and the parishioners present at the meeting were required to choose another fit and proper person

(1) In M. 10 Geo. II. a *mandamus* was granted to the churchwardens and overseers of the poor of the parish of St. James, Clerkenwell, and to the principal inhabitants thereof, to assemble together in the parish church to make rates and collect the money for repairing the church; and

in E. 1 Geo. III. a *mandamus* was granted to the vicar, churchwardens, and parishioners of Croydon, to hold a vestry, and nominate ten persons, out of whom trustees were to choose collectors of a rate for the repair of the church.

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[ \*201 ]

to be the other churchwarden, but that they unlawfully and contemptuously refused so to do." It then commanded the parishioners to meet, &c. The return to the *mandamus* stated "that there now is, and from time whereof the memory of man is not to the contrary, hath \*been an ancient and laudable custom, used and approved of within the parish, to have no churchwardens or churchwarden of and for the parish, and that the duties appertaining by law to the office of churchwardens have been from time out of mind, and still are within the parish duly discharged by the overseers of the poor of the parish, without this, that within the parish there of right ought to be two churchwardens of and for the parish, to be chosen in manner and form as in the said writ is in that behalf suggested, and therefore the parishioners of the parish have not elected and chosen, nor ought they to elect and choose any person or persons to be a churchwarden or churchwardens of the said parish, in manner and form as by the writ they were commanded." In the present Term

*Comyn* was heard against the return :

The return is bad. The custom set out to have no churchwarden is illegal. The return states that the duties have been immemorially discharged by the overseers.

(LORD TENTERDEN, Ch. J. : When overseers have not existed time out of mind. The return admits that there are duties appertaining to churchwardens ; and if that be so, it cannot be law that there should be no person bound to discharge those duties, to take care of the church, its ornaments, &c. There may be instances where there have been no churchwardens in fact, but the law requires that there should be such officers.)

*Deacon, contrà :*

No statute positively declares that a parish must have churchwardens, nor is there any decision to that effect. The eighty-ninth canon indeed says, "all churchwardens shall be chosen by the joint \*consent of the parson and parishioners ;" but it does not order in express terms that there shall be churchwardens in

[ \*202 ]

every parish; it merely prescribes a particular mode of election in parishes which have churchwardens. Yet even if it had declared positively that there should be churchwardens in every parish, it would not have been compulsory on the inhabitants of a parish to elect them, for the canons are not binding on the laity: *Dawson v. Fowle* (1); *The Churchwardens of Northampton's case* (2); and a custom will prevail against the canon: *Anonymous* (3). It has been decided also, that there may by custom be only one churchwarden in a parish, notwithstanding that in the statute of Eliz. and the eighty-ninth canon mention is made of churchwardens in the plural: *Rex v. Inhabitants of Hinckley* (4), *Rex v. Inhabitants of Earl Shilton* (5), *Rex v. Catesby* (6).

(LORD TENTERDEN, Ch. J.: Who is to see to the repairs of the church, if there are no churchwardens?)

The churchwardens themselves have no power in the first instance to make any rate for the repair of the church; their duty being to summon the parishioners for that purpose, who may in fact make such rate independently of any control from the churchwardens: *Watson's Clergyman's Law*, c. 39, *Gibson's Codex*, p. 196. But there is no need for this *mandamus* to provide for the repairs of the church, for the Spiritual Court may compel the parishioners at large to repair, and may excommunicate every one of them till it is repaired: *Watson*, c. 39. But supposing that every parish is by the common law compellable to have churchwardens, why should a custom not be good for a parish to have none? as well as the \*custom of gavel-kind or borough-English, both of which are in derogation of the common law. It does not affect the validity of a custom, that it is unusual or inconvenient; thus a custom, for the inhabitants of a hundred not to serve on juries out of the hundred, has been held good: *Rex v. Pugh* (7).

[ \*203 ]

He then contended the writ should be quashed *quia improvidè emanavit*, and relied on the authorities cited in shewing cause

- (1) *Hardres*, 378.
- (2) *Carthew*, 118.
- (3) 1 *Ventr.* 267.
- (4) 12 *East*, 361.

- (5) 1 B. & Ald. 275.
- (6) 2 B. & C. 814.
- (7) 1 *Doug.* 188.

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against the rule for the *mandamus*. He also urged the difficulty as to the parties to whom the writ could be directed, and the want of means of enforcing obedience to it.

LORD TENTERDEN, Ch. J. :

The writ may be directed to the inhabitants; and those inhabitants on whom it is served may be punished for disobedience. If the Court think the writ ought to issue, they will find some means of enforcing obedience to it. The return must be quashed, and a peremptory *mandamus* must issue.

LITTTLEDALE, J. concurred.

PARKE, J. :

In case of disobedience, this Court may grant a criminal information against the inhabitants upon whom the writ is served.

PATTESON, J. concurred.

*Return quashed, and peremptory mandamus to issue.*

\* \* \* \* \*

## PRICE v. THOMAS.

(2 Barn. & Adol. 218—219; S. C. at Nisi Prius, nom. *Pratt v. Thomas*, 4 Car. & P. 554.)

By indenture, in the form, and containing the usual covenants, of a lease, A. demised premises to B., and B. and C. covenanted to pay the rent; but C. was not otherwise referred to in the instrument. In an action against C., on the covenant to pay rent: Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary.

THIS was an action for breach of a covenant to pay rent. On the trial at the last Spring Assizes for Shropshire, before Patteson, J., it appeared that by a certain indenture, to which the plaintiff, the defendant, and one Hammond were the parties, and which was in the common form of an indenture of lease, the plaintiff demised a messuage and farm to Hammond at a certain yearly rent. The defendant and Hammond covenanted to pay the rent; but all the other covenants were between the plaintiff

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and Hammond only. The indenture had a lease stamp of 1*l.* 10*s.*; and it was objected at the trial that this was not sufficient; that the defendant was not a lessee; that the instrument, as far as it regarded him, was a deed merely, and subject, as such, to a stamp duty of 1*l.* 15*s.* The learned Judge thought, as the primary intention was that the instrument should be a lease, the stamp was a proper one. A verdict was found for the plaintiff, but leave given to move to enter a nonsuit.

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*Campbell* now moved accordingly :

The covenant in which alone the defendant has joined, is, as regards him, merely collateral to the rest of the instrument: it may be considered, in the suit between these parties, as a separate deed, or as if all the other covenants of the indenture were struck out. To be available, therefore, in this cause, the instrument should have had not a lease, but a deed stamp.

LORD TENTERDEN, Ch. J. :

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If this covenant had introduced matter no way connected with the demise, but wholly distinct and independent, it might then have been said that the plaintiff could not benefit by such a stamp as was affixed to this indenture. But that was not the case. The objection, therefore, cannot prevail.

LITLEDALE, J. :

I am of the same opinion. The lease was the principal, to which this covenant was an accessory.

PARKE, J. :

This covenant was part of the consideration for granting the lease. I think there is no ground for the rule.

PATTESON, J. concurred.

*Rule refused.*

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SUMPTER AND OTHERS, ASSIGNEES OF POUND, *v.*  
COOPER (1).

(2 Barn. & Adol. 223—226; S. C. 9 L. J. M. C. 226.)

An equitable mortgage by deposit of title deeds is not within the Middlesex Registry Act, 1708.

ASSUMPSIT for money had and received, &c. Plea, *non assumpsit*. At the trial before Lord Tenterden, Ch. J., at the sittings in London after last Hilary Term, the following facts appeared: In 1827 the defendant and George Pound became the purchasers, in equal moieties, of some houses in the county of Middlesex. The defendant lent Pound 500*l.* to pay his half of the purchase-money. A conveyance of the premises to them was duly executed; and it was agreed between them that the deeds should stand as a security to the defendant for the money he had advanced: they were accordingly left in the possession of the attorney who had acted for both parties in the business, and retained by him for the purpose agreed upon. In March, 1828, Pound, being reduced to great difficulties, executed an assignment of his moiety of the houses to the defendant, under circumstances which formed a strong case of fraudulent preference; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. Pound afterwards became bankrupt. The assignment from the commissioners to the assignees was duly registered. From March, 1828, when Pound made over his share in the houses as above mentioned, till the commencement of this action, the defendant received the whole of the rents; and to recover a moiety of these the action was brought.

[ \*224 ]

At the trial several objections in point of law were \*urged against the claim of the plaintiffs, and particularly that, although the assignment in March, 1828, might be void as against that under which the plaintiffs claimed, and which was properly registered, the defendant was still entitled to retain the rents by virtue of the equitable mortgage made to him at the time of advancing the purchase-money. The LORD CHIEF JUSTICE directed a nonsuit, reserving liberty to the plaintiffs to move to

(1) Followed by the Court of Appeal in *Kettlewell v. Watson* (1884) 26 Ch. Div. 501, 53 L. J. Ch. 717. Under the modern Yorkshire Regis-

tries Act, 1884, it is otherwise: see *Battison v. Hobson*, '96, 2 Ch. 403, 412, 65 L. J. Ch. 695, 74 L. T. 689.—B. C.

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enter a verdict in their favour, if the Court should think the equitable mortgage unavailable. In the present Term,

*Campbell* moved for a rule to shew cause why a verdict should not be entered for the plaintiffs on the point reserved; or, why there should not be a new trial. First, as to the latter part of the motion. The defendant, supposing him to have been equitable mortgagee, was not entitled on that account to take the rents and profits, though he might have gone into a court of equity and demanded a legal conveyance. His claim to the rents could only arise by the assignment, which was void. Further, whatever lien the defendant had upon these houses as equitable mortgagee, was merged when he took an absolute assignment of the same property; and by that assignment his title must stand or fall. Then, as to the point reserved. By the statute 7 Ann. c. 20, s. 1, every deed or conveyance affecting lands, tenements, or hereditaments in Middlesex “shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered, as by this Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser \*or mortgagee shall claim.” [ \*225 ] Assignees of a bankrupt are purchasers for valuable consideration: *Drury v. Man* (1); and therefore, supposing the assignment from Pound to the defendant to have been made *bonâ fide*, and in all other respects unexceptionable, still it would have been void as against the conveyance made by the commissioners to the assignees, which was first registered, though last made: *Doe dem. Robinson v. Allsop* (2). And that being so, can the defendant set up a mortgage without deed to bar the title of the assignees, where a mortgage by deed is insufficient? There appears to have been no decision on the point; but an equitable mortgage seems to fall as much within the mischief of the Act as a legal one, and it would be hard that assignees should be placed in a worse situation by one than by the other.

LORD TENTERDEN, Ch. J. :

The only question is, whether, an equitable mortgagee having

(1) 1 Atk. 95.

(2) 5 B. & Ald. 142.

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got possession of the rents and profits, they can be taken out of his hands again?

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., on a subsequent day of the Term, delivered the judgment of the COURT :

[ \*226 ]

We are of opinion that the nonsuit was right. The defendant was the equitable mortgagee of the bankrupt's moiety of the premises, and having received the whole of the rents he would have had an equitable right to retain them against the bankrupt if he had remained solvent, and he has the same right against the assignees, who can only \*recover that to which the bankrupt was both legally and equitably entitled. As to the statute of Anne, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered.

*Rule refused.*

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## ROGERS v. WOOD AND ANOTHER(1).

(2 Barn. & Adol. 245—256.)

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Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the county palatine, and within that of the city, of Chester; a document from the Remembrancer's office of the Court of Exchequer was produced, purporting to be a decree made (after hearing of a complaint against the citizens of Chester, and their answer,) by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under-Treasurer, and the Chief Baron, with the advice and assent of a Queen's Serjeant, and the Queen's Attorney and Solicitor-General, and others of the same Court : Held, that this document was not admissible in evidence as a decree, because it was not a decree of the Court of Exchequer nor of any Court known to the law at the time when it purported to have been made; nor as an award, because there appeared no voluntary submission of parties; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding.

PROHIBITION. An information in the nature of *quo warranto* having been exhibited in the Court of Session for the county

(1) Cited by PARKE, B. in *Crease v. Barrett* (1835) 1 Cr., M., & R. 919, 928.—R. C.

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palatine of Chester to try the plaintiff's title to the office of mayor of Chester, a plea to the jurisdiction was pleaded, and a rule obtained in this Court for a prohibition directed to the Judges and prothonotary of the Court of the county palatine, and to the relators, on the ground that the city of Chester, being a county of itself by charter 21 Hen. VII., was not within the jurisdiction of the Court of Session for the county palatine, as to offences *quasi* criminal committed within the city. The rule being made absolute, the plaintiff declared in prohibition. The issue in prohibition was, whether the usurpation of the office in the *quo warranto* information mentioned, was committed within or out of the jurisdiction of the Court of Session of the county of Chester. At the trial before Taddy, Serjt. at the Shropshire Assizes, 1829, the following documents produced from the decree book in the Remembrancer's office of the Court of Exchequer were received in evidence for the defendants: "Civitas Cestr. Memorand. that in this present Term of St. Michael, viz. the 9th day of November, in the fourth year of the reign of Elizabeth by the grace of God, &c., Queen of England, \* &c., John Webster, one of the aldermen of the city of Chester, John Cowper, another alderman of the said city, and late mayor of the same, Richard Dutton and Thomas Pillers, late sheriffs of the said city, and William Hamnell, now one of the sheriffs of the said city, appeared before the Right Honourable William Marquis of Winchester, Lord High Treasurer of England, Sir Edward Saunders, Knight, Lord Chief Baron, Sir Walter Mildmay, Knight, Chancellor of the Exchequer at Westminster, George Frywell and Thomas Pyme, Esquires, two of the Queen's Majesty's Barons of the said Exchequer, John Thockinton, Esquire, justice of Chester, Gilbert Gerrard and William Rosewell, Esquires, Attorney and Solicitor-General unto her Majesty, and also Sir Thomas Saunders, Knight, the Queen's Majesty's Remembrancer of the said Court, and other her Grace's officers and ministers of the same Court, being present at the dwelling-house of the said Lord Treasurer in London, and then and there the said citizens being upon good ground charged by the said Lord Treasurer that they by colour of their charter, and also of the offices of mayoralty and of sheriffs, had estranged themselves

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from the duty which they owed to the royalty and regal jurisdiction of the county palatine of Chester, and refused to obey writs and process to them directed in her Majesty's name under the seal of the county palatine, and that they encroached upon the regality, liberties, and privileges of that county palatine," &c., they, the said citizens, having with them two serjeants as counsel-at-law, answered by referring to divers charters, and particularly stating that by charter of King Henry VII., the city was made a county of itself, and separated from the county palatine, and that the mayor and sheriffs of the city were the only \*Judges of all causes arising within the city, and that the city was, by the said charter, exempt from the jurisdiction of the county palatine, and from all manner of writs and process proceeding out of the Court of Exchequer of the same. The answer of the deputy-chamberlain of the county palatine was then stated, alleging that the city of Chester was parcel of the county palatine, &c. before the granting of the charter of Henry VII., and subject to the jurisdiction of the Earls of Chester, which earldom, until there should be a prince, was in the Queen; and although the city was by that charter made a county of itself, as distinguished from the county of Chester, yet it was not exempt from the jurisdiction of the county palatine; in proof of which the deputy and his counsel produced various documents: that the citizens of Chester not having with them their charters to produce, it was ordered that the citizens should appear to answer unto such articles as should be in writing laid against them on the first day of the next Term, till which time final order in the premises was deferred; and that, in the meanwhile, the jurisdiction of the county palatine should be obeyed: and that the deputy-chamberlain should put the articles in writing and give copies to the said citizens. The other document, which purported to be of Hilary Term, 5 Eliz., recited that debate, strife, and controversy had been had in this Court of Exchequer, and that the mayor, sheriffs, and citizens had sent up their recorder, with all their charters, &c., and that the matter had been divers times heard and thoroughly debated before the Marquis of Winchester, Lord High Treasurer of England; Sir Walter Mildmay, Knight, Chancellor of this Court of

Exchequer; Sir Richard Sackville, Knight, Under-Treasurer, \*and Sir Edward Saunders, Knight, Chief Baron, of the same Court, by the advice and assent of Thomas Carus, Esq., serjeant-at-law to the Queen, and G. Gerrard and W. Rosewell, Esquires, her Grace's Attorney and Solicitor-General, and others of the said Court of Exchequer; and it then stated that upon deliberate consideration of the records produced, it appeared that the county palatine, from time immemorial, had been a county palatine, and had regal jurisdiction; that the city of Chester was and is parcel thereof, and the Court of Exchequer of the said county was the ordinary Chancery Court of the county palatine; that the chamberlain was the chancellor and chief officer of the said Court, for all causes appertaining to the jurisdiction of chancellor, and that the officers of the city had used and ought to make return of all process to them directed under the seal of the earldom; and then, after adverting to the charter of the city, the document proceeded, "It is ordered, decreed, and declared, that the said city is within and a member of the said county palatine, and the same is and ought to be within and member thereof, and so shall be from henceforth esteemed, used and taken; and that the officers of the same city shall from time to time make a good and sufficient return of all such writs of *corpus cum causâ* and other writs as shall be to them directed under the seal of the said earldom, according to the tenor of the same writs: that the said Court of Exchequer is, and time out of mind of man hath been, the Chancery Court of the said county palatine, as well for the granting of all original process as for proceeding in and determining of traverses and other matters of equity appertaining to the jurisdiction of a chancellor, and that the chamberlain is, and always hath \*been, the chancellor and chief officer of the said Court of Exchequer at Chester. Also it is further ordered, &c. that the said mayor and citizens shall and may hold plea by plaint after the course of the common laws of this realm in their Courts of Portmote and Pentice within the said city of all manner of pleas rising within the liberties of the said city, as well real and personal as mixt (except pleas of dower and right), and of pleas of the Crown, according to the tenor and effect of their charters and of the customs of the same city,"

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&c. It was objected by the plaintiff's counsel, that the instrument produced as a decree of the Court of Exchequer was not a record of that Court, but a mere entry of something done by persons, some of whom were Judges of the Court of Exchequer, and others not; secondly, that it was not made in any suit before that Court, of which cognizance could be taken; thirdly, that, if it were to be considered a decree, no bill and answer were proved. The jury found a verdict for the defendants; and a rule for a new trial having been obtained on the above grounds,

*Campbell and J. Jervis* shewed cause, at the sittings in banc after Trinity Term, 1830, before Lord Tenterden, Ch. J., Bayley, J. and Littledale, J.:

The decree in question was a good decree or judgment of the Court of Exchequer. From Madox's Exchequer, c. 21, s. 1, it appears that the Lord High Treasurer, while that office was exercised by one person, was a Judge of the Court of Exchequer, with the Chancellor of Exchequer, Chief Baron, and other Barons, and that decrees were made by them with the advice and assent of the King's council. The Under-Treasurer was also then a member \*of the Court occasionally.

[ \*250 ]

(*Taunton, contra*, admitted that the Treasurer, Chancellor of the Exchequer, the Chief and other Barons, constituted the Equity Court of Exchequer, but denied that the Under-Treasurer was a component part of it.)

In *Sir Thomas Wroth's* case (1), the following note appears by SAUNDERS, C. B., to whom the report was submitted before it was printed: "That SAUNDERS, C. B., put the other Barons in mind of the great assembly of all the justices on the 28th day of April, in the first year of the reign of Queen Mary, of which assembly the said Chief Baron was one, together with Eyre, Master of the Rolls; Baker, Under-Treasurer of the Exchequer; Griffen, Attorney-General; and Cordel, Solicitor-General; when it was resolved, that patents without the words *pro nobis, hæredibus et successoribus nostris*, being granted for the corporal exercise of an

(1) Plowd. 459.

office or service, are good." The case referred to by SAUNDERS, C. B., is reported in Dyer, 92, pl. 20. The decree in *Wroth's* case shews that the Queen's Serjeants and Attorney and Solicitor-General were called in, and the opinion of the Judges of C. P. also taken by the Court of Exchequer before giving judgment. In Price's Law and Course of the Court of Exchequer, book i. c. 2, it is stated, that the Attorney and Solicitor-General were frequently called in in former times with the King's Serjeants and others of the King's council, to assist the Court of Exchequer with their advice in matters depending before the Barons, which were not mature for judgment: in support of which position the author refers to the forms afterwards cited, in c. 14, and to the records of the Court. Then, if the \*Court was constituted thus before Elizabeth's time, the plaintiff must shew that such constitution had become illegal at the time when the decree was made. As to the form of the document in question, it is true that it appears to be a decree, without bill or answer. It may have come on by way of petition. It is stated by Madox, c. 22, s. 8, that the records or bundles made up by the Remembrancers of the Exchequer contain, among other things, many entries or memorandums made *pro commodo regis*, to control accomptants, or to save the King's right, either by way of memorandum *pro rege*, or of *loquendum cum rege*, or *loquendum cum justiciario*, or *cum concilio regis*. And among these entries there appear many which concern franchises; as, touching the fair at St. Ive belonging to the Abbot of Ramsey: concerning a claim of the Bishop of Lincoln to have the chattels of his men who were fugitives or hanged; concerning certain charters produced at the Exchequer on behalf of Walter de Esselye; concerning the town of Bedford not being tallaged, when the King's and other demesnes were tallaged. The document now in question may be considered as belonging to this class of records. Again, the general jurisdiction of the county palatine in *quo warranto* not being disputed; and the controversy being, whether the city of Chester be exempt from that jurisdiction, the question is one of boundary, and this document may be received as evidence of reputation. Besides it may be admissible as an award, for the parties (the city officers on the one hand, and the deputy-chamberlain on the other) having

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[ \*251 ]

ROGERS appeared must be taken to have submitted their differences  
 r. to those who made the decree.  
 WOOD.

[ 252 ] *Taunton and Tyrwhitt, contra :*

The instrument put in as a decree of the Court of Exchequer was not the regular judgment or decree of any accredited Court, but the order of an anomalous jurisdiction, unknown to the law, and not binding on the subject. The introduction of persons merely laymen to act as Judges is a breach of that usage and prescription by which alone the superior Courts exist and enjoy authority. This document appears, on the face of it, not to be a decree of the Court of Exchequer, for the Under-Treasurer with the Queen's Serjeants and her Attorney and Solicitor-General act as component parts of the Court, while the puisne Barons, the legal Judges of the Court, do not appear to have been parties to the final determination. For the words "and others of the Court of Exchequer" will not include persons of superior rank, as Judges, where inferior personages have been first mentioned, *Archbishop of Canterbury's case* (1); and the Chief and two other Barons are mentioned in the former document, of Michaelmas Term, 4 Eliz. Bills in equity in that Court are addressed to the Chancellor and Under-Treasurer, the Lord Chief Baron, and other Barons, but the offices of Chancellor and Under-Treasurer have long been united. The Under-Treasurer in the time of Elizabeth would merely rank among the "other officers and ministers" of the Court, mentioned by Lord Coke, 4 Inst. 104, after the great officers and Judges. But in this supposed decree the Under-Treasurer is made a person of co-ordinate judicial authority with the Treasurer, the Chancellor of Exchequer, and the Chief Baron, whereas he never had any judicial authority ;

[ \*253 ]

and if he had, he could not act \*in the presence of his principal, the Lord Treasurer, or of the Chancellor of the Exchequer. This decree, too, is said to be made with the advice and assent of the Queen's Serjeant and Attorney and Solicitor-General, as if their concurrence were necessary to the proceeding, which would not be the case in any regular judicial act of the Court. The cases in *Madox* of persons assisting in judgments

(1) 2 Co. Rep. 46 b.

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are from very early times, viz., before the end of Edward II. Though the superior Courts occasionally call in the assistance of the Judges of other Courts in matters of difficulty, the judgment is delivered and entered of record as, and in fact is, that of the Court which so requires assistance. The note cited from Plowden (if implying that the persons there mentioned all acted as judicial officers of the Court of Exchequer), is at variance with Lord Coke, 4 Inst. chap. 11, p. 103, Britton, fol. 2 b, and Fleta, lib. 2, c. 2, all of whom mention the Exchequer as having a distinct jurisdiction, and justices to administer it. And whatever irregularity may be found in Madox to have taken place in the Exchequer before Edward III.'s time is put a stop to by 31 Edw. III. st. 1, c. 12(1), touching erroneous judgments in the Exchequer, which shews the Barons to be the only persons who gave judgment. This appears also from the case, 4 Inst. 105, of an information on intrusion against Brace, 25 Eliz.; and that the Lord Treasurer who was joined with the Barons, had the mere keeping of the records; but that is no judicial duty, nor entitling him to act as Judge. Again, in 4 Inst. p. 118, it is said that the Judges of the court of equity in the Exchequer Chamber are the Lord Treasurer, the Chancellor and Barons of the Exchequer; and that, "generally, their jurisdiction is as large for matter of \*equity as the Barons in the Court of Exchequer have for the benefit of the King by the common law."

[ \*254 ]

In the custody from which this instrument came, the bill and answer should be found, if a suit had existed with a legal origin. It is merely assumed that the matter came on upon petition. If this supposed decree had its origin in a commission, *Scroggs v. Coleshill*(2) shews that when the Crown, as was not unfrequent in the Tudor reigns, granted a commission to great personages associated with some Judges to adjudicate a particular case, the Court of C. P. in that instance disregarded their order, and agreed that a *habeas corpus* should be granted. The evil of such irregular commissions was early felt, and provided against in criminal matters by Stat. West. 2nd, 13 Edw. I. st. 1, c. 29, which provides, that "no commissions to hear outrages or misdemeanors shall be granted before any justices, except in either bench or in

(1) Repealed, Stat. Law. Rev. 1863, 1872.

(2) Dyer, 175.

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eyre, unless it be for an heinous trespass," &c. 2 Edw. III. c. 2, enacts, that such Judges shall be men learned in the law, and none other. For only such commissioners as have warrant of law and continual allowance in courts of justice are to be allowed, and all commissions of new invention are against law till allowed by statute: 4 Inst. 163, 2 Inst. 51, 478, Com. Dig. Prerogative (D 29).

[ \*255 ]

The instrument was left to the jury as a regular judgment or decree in a suit; it was not tendered as evidence of reputation, or as an award. The present plaintiff is not party or privy to the suit (if a proceeding instituted as this was can be so termed) in which the supposed decree or award was made. Any parol evidence, on which the tribunal may have come to its \*decision, was objectionable as made *post litem motam*, and the judgment given in consequence can be entitled to no more weight than the testimony on which it was founded.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., now delivered the judgment of the COURT :

The question in this case was, whether two documents which had been received in evidence on the trial ought to have been admitted. The question in the cause related to the rights of the county of the city of Chester, as between that city and the county palatine of Chester. The first document purported to be a history of the early stage of certain proceedings had before the Lord Treasurer and other persons there mentioned, and the second to be a decree by the Lord Treasurer and others on the subject-matter of those proceedings: and this last document was undoubtedly a very important one, as shewing what were the rights of the corporation of the city, and limiting them with reference to the rights of the county palatine. It was objected that this could not be considered the decree of any Court of competent jurisdiction, and therefore ought not to have been received, and we are of that opinion. The document is one of a very irregular character. (His Lordship then stated the substance of the two documents produced, observing that the matter began by parol, upon a charge by the Lord Treasurer against

the members of the corporation before him and the other persons mentioned in the first instrument.) Now, one cannot read the names that appear here without seeing that the decree was not that of the Court of Exchequer, nor of any court of justice known at that \*time. The Judges consisted of some persons who were members of the Court of Exchequer joined with others who were not, her Majesty's Attorney and Solicitor-General, and the Queen's Serjeant appearing in a judicial character. It was evidently, therefore, a proceeding before persons not forming any Court known to the laws of this country, nor having any competent authority to decide the matter in issue, or to make the decree which they made. It was said that this document might be received as an award made between the parties, or as evidence of reputation. Now, an award must be founded on a voluntary submission, whereas in this case the citizens of the county of the city were not voluntary parties. They were called before the persons who made the decree by an authority which at that time of day they might not think it convenient to resist. Declarations can only be evidence of reputation when made by those who have personal knowledge of the fact. Here the persons acting as Judges had no knowledge of the fact, except what they derived in the course of that proceeding. The decree of such persons, therefore, cannot be evidence of reputation. We are of opinion that the documents were improperly received, and consequently the rule for a new trial must be made absolute.

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[ \*256 ]

*Rule absolute.*

RIGHT, D. WILLIAM JEFFERYS, AND OTHERS, v.  
HENRY BUCKNELL AND TWO OTHERS (1).

1831.  
April 26.  
[ 278 ]

(2 Barn. & Adol. 278—284; S. C. 9 L. J. K. B. 304.)

A. having an equitable fee in certain lands, mortgaged the same to B. by lease and release. The release recited, that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted, that he was lawfully or equitably seised in his demesne of and in, and otherwise well entitled to the same. The legal estate was subsequently

(1) Followed by MELLISH, L. J. in *Liberator, Building Society* (1878) 10 Ch. D. 15, 22; *Onward Building Society v. Smithson*, '93, 1 Ch. 1, 13, 14, 10 Ch. 22, 34, 44 L. J. Ch. 157, 163. And see *General Finance, &c. Co. v.* 62 L. J. Ch. 1, 38, 68 L. T. 125.—R. C.

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conveyed to A., and he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C. :

Held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release.

Held, 2ndly, that the release did not operate as an estoppel by virtue of the words, “ granted, bargained, sold, aliened, remised, released,” &c. because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time of the release.

Held, 3rdly, that this case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in A. at the time of the mortgage to B., A. having then only an equitable interest, which passed to B., whose title as to that was not disputed.

THIS case was argued during the last Term by *Platt* for the plaintiffs, and *Preston* for the defendants, before Lord Tenterden, Ch. J., Littledale, J., Taunton, J., and Patteson, J. The facts of the case, the arguments urged, and the authorities cited, are so fully stated and commented on in the judgment pronounced by the Court, that it is deemed unnecessary to detail them here.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., in the course of this Term, delivered the judgment of the Court :

This case came on upon a motion to enter a nonsuit. At the trial before the Lord Chief Justice Tindal, at the Summer Assizes for the county of Kent, 1830, it appeared that the action was brought to recover two houses at Brompton in the parish of Chatham. As to one the learned Judge was of opinion, that the ejectment would not lie for want of a notice to quit. As to the

[ \*279 ] \*other, there was a verdict for the lessors of the plaintiff, subject to leave to enter a nonsuit. The facts proved were, that Thomas Jarvis the elder, having contracted to purchase the premises, was let into possession by order of the Court of Chancery on the 29th of December, 1808 ; and being let into possession, but never having had any conveyance executed to him, he afterwards, on the 2nd of October, 1820, devised them to his son and heir, Thomas Jarvis the younger. Upon his father's death the son entered, and on the 21st of January, 1823,

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he mortgaged the premises, by indentures of lease and release, to the lessors of the plaintiff. The lease and release were in the common form, excepting that in the latter there was a recital that the said Thomas Jarvis is legally or equitably entitled to the several messuages or dwelling-houses conveyed, and in the covenant for title, the releasor covenanted that he is and standeth lawfully or equitably, rightfully, absolutely, and solely seised in his demesne as of fee of and in, and otherwise well entitled to the said several messuages or dwelling-houses, &c. On the 1st and 2nd of April, 1824, indentures of lease and release, under the contract of sale in 1808, were executed to Thomas Jarvis the younger, whereby he became seised of the legal estate in the premises, which he afterwards conveyed by mortgage, for a valuable consideration, to the defendant Henry Bucknell. There was no proof that Bucknell had any notice of the prior mortgage, and upon his mortgage all the title-deeds were delivered to him. In this action, he had come in under the common rule, and defended as landlord; the other defendants were the tenants in possession.

The question on which the Court took time to consider was, whether the defendant, claiming under the mortgagor Thomas Jarvis the younger, could set up as a defence \*against the lessors of the plaintiff, the legal estate acquired by him since their mortgage. And it has been argued for them that he, as representing the mortgagor Thomas Jarvis, is estopped from doing so; and for this purpose, Co. Litt. 352 a, Litt. sect. 693, and the cases of *Bensley v. Burdon* (1), *Helps v. Hereford* (2), *Goodtitle v. Morse* (3), *Goodtitle v. Bailey* (4), *Goodtitle v. Morgan* and others (5), *Doe d. Christmas v. Oliver* (6), *Trevivan v. Lawrance* (7), and *Taylor v. Needham* (8), were cited. Of these cases none are applicable to the point in question, except *Goodtitle v. Morgan* and *Bensley v. Burdon* (of which more presently), and *Helps v. Hereford* and *Doe v. Oliver*. The last two are cases of estoppels, arising out of fines levied before any interest vested; and there is no doubt

[ \*280 ]

(1) 25 R. B. 258 (2 Sim. & St. 519).

(2) 20 R. B. 416 (2 B. & Ald. 242).

(3) 1 R. B. 719 (3 T. B. 365).

(4) Cowp. 597.

(5) 1 T. B. 755; see 1 R. B. 397, n.

(6) 34 R. B. 358 (10 B. & C. 181).

(7) 1 Salk. 276, 2 Ld. Ray. 1048.

(8) 11 R. B. 572 (2 Taunt. 278).

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that a fine may operate by way of estoppel, but the present is not the case of a fine. In sect. 693, Littleton, speaking with reference to the doctrine of remitter, says, "This is a remitter to him, if such taking of the estate be not by deed indented, or by matter of record, which shall conclude or estop him;" and in Lord Coke's commentary on this passage, a deed indented is distinguished from a deed poll in this particular of remitter, for the deed poll is only the deed of the feoffor, donor, and lessor, but the deed indented is the deed of both parties, and, therefore, as well the taker as the giver is concluded. In 352 a Lord Coke divides estoppels into three sorts, the second of which he thus defines; "By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll." And there are many other

[ \*281 ] authorities \*to shew that estoppel may be by any indenture or deed poll. But upon this rule there are many qualifications and exceptions engrafted. It is a rule, that an estoppel should be certain to every intent, and, therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility: Co. Litt. 352 b, where this case is put; "An impropriation is made after the death of an incumbent, to a Bishop and his successors. The Bishop, by indenture, demiseth the parsonage for forty years, to begin after the death of the incumbent. The dean and chapter confirmeth it. The incumbent dieth. This demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent." This passage from Co. Litt. is adopted by Chief Baron Comyns in his Digest, Estoppel (E. 2). Now in the case at Bar the very truth, that the mortgagor, Thomas Jarvis the younger, had only an equitable interest, is partly admitted; for the recital states in the alternative, that he is lawfully or equitably entitled, and the covenant for title is to the same effect. At all events, there is in this recital a want of that certainty of allegation which is necessary to make it an estoppel. Lord Holt lays it down in *Salter v. Kidley* (1), that a

general recital is not an estoppel, though a recital of a particular fact is. And upon this the judgment of the LORD CHANCELLOR in the recent case of *Bensley v. Burdon*, which was relied upon by the counsel for the lessors of the plaintiff, proceeded. The deed of release in that case recited, that Francis Tweddle the younger was, subject to his father's life estate, seised or possessed \*of, or well entitled to, the lands and tenements thereafter mentioned in reversion or remainder; and by the deed he granted and released this remainder, and covenanted that he was seised of it for an indefeasible estate of inheritance. The present MASTER OF THE ROLLS, then Vice-Chancellor, by whom this case was first decided, according to the report in 2 Sim. & St. 519 (1), held, that this was an estoppel, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. The LORD CHANCELLOR confirmed this judgment (2), but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the present, in which there is no certain precise averment in the deed of release of any seisin in T. Jarvis the younger, but a recital only, that he was legally or equitably entitled. We think, therefore, that this recital does not operate by way of estoppel.

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We are of opinion, also, that the release whereby T. Jarvis granted, bargained, sold, aliened, remised, released, &c. the premises, does not by mere force of these words amount to an estoppel. Littleton lays it down, sect. 446, that "no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have, in the same tenements, without clause of warranty, &c., and after the father dieth, &c. the son may lawfully enter upon the possession of the disseisor." To the same effect is *Wivel's* case, Hob. 45, and Perk. sect. 65, \*that where a son and heir joins in a grant in the lifetime of his father, while he has neither possession nor right in the matter

[ \*283 ]

(1) 25 R. R. 258.

(2) 5 Russ.: see 25 R. R. 263, n.

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granted, the grant is utterly void, and nothing passes. So here, if the release pass nothing but what the releasor lawfully had, and he had no legal title in the premises at the time of the release made, those who claim under him by a subsequent good title are at liberty to shew this ; and there is no implied estoppel, as appears from the authorities just cited, and the Year Books 49 Edw. III. 14, 15, 45 Ass. 5, 46 Ass. 6, and Brook's construction of these books in his Abr. tit. Estoppel, pl. 146, 10 Vin. Abr., Estoppel (M).

The case was put in argument on another ground for the lessors of the plaintiff, namely, that it was within the common rule that a mortgagor cannot dispute the title of his mortgagee. Such a rule without reference to the technical doctrine of estoppel, undoubtedly is to be met with as laid down by Lord HOLT, in *Salkeld*, and has been often recognised in modern times. But we are of opinion that it does not apply to the present case. Here, the defendant Bucknell claims, as a purchaser for a valuable consideration without notice, a legal interest which was not in T. Jarvis at the time of his mortgage to the lessors of the plaintiff, and T. Jarvis had then an equitable interest which passed to them, and which is not questioned, nor sought to be disturbed by the defence which Bucknell sets up. This case much resembles that of *Goodtitle v. Morgan* (1), where a second mortgagee without notice, who got in the legal title, by taking an assignment, from a trustee and the mortgagor, of an outstanding term assigned to attend the inheritance, was holden entitled to a legal preference against the first mortgagee.

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There, as here, it might be said that he was bound by the same conclusion as the mortgagor, and should not question the right of the prior mortgagee. But the legal title prevailed there, and so we think it ought here. The consequence upon the whole is, the rule for entering a nonsuit must be absolute.

*Rule absolute.*

(1) 1 T. R. 755.

ROBSON AND SHARPE *v.* DRUMMOND (1).

(2 Barn. &amp; Adol. 303—309; S. C. 9 L. J. K. B. 187.)

1831.  
May 2.

[ 303 ]

A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five years, at seventy-five guineas a year. At the time of making the contract, C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years the partnership between A. and C. was dissolved, A. having assigned all his interest in the business and in the contract in question to C., and the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that he (C.) had become the purchaser of the carriage then in his, B.'s, service. The latter answered that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A. and C., against B., for the two payments which, according to the term of contract, would become due during the last two years of its continuance, it was held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and having become incapable of performing his part of the agreement.

THIS was an action brought by the two plaintiffs against the defendant for breach of an agreement, whereby the plaintiff Sharpe, on the 2nd of February, 1824, agreed to furnish the defendant with a new chariot, from that day, for the term of five years thence next ensuing, at the yearly payment of seventy-five guineas per annum, each yearly payment to be paid in advance. Sharpe was to keep the chariot in all necessary repair, \*violence excepted, to supply the same with new wheels when required, and to new paint it once in the said term; and at the expiration of the term, defendant was to cause the chariot to be delivered to Sharpe, with all its appointments, in good condition, fair wear and tear excepted. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after Michaelmas Term, 1830, it appeared that Sharpe, one of the two plaintiffs, in February, 1824, and for several years preceding, carried on business as a coachmaker in South Street, Grosvenor Square, and that at the time of the contract, Robson, the other plaintiff, was a secret partner with Sharpe, but that was not known to the defendant,

[ \*304 ]

(1) Cited and followed in *Humble v. Hunter* (1848) 12 Q. B. 310, 317, 17 L. J. Q. B. 350, and by BACON (Chief Judge) in *Ex parte Chalmers, Re Edwards* (1872) 42 L. J. Bank. 2,

5: distinguished in *British Waggon Co. v. Lea & Co.* (1880) 5 Q. B. D. 149, 152, 49 L. J. Q. B. 321, 324.—R. C.

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the business being carried on in the name of Sharpe only. A chariot was built according to the terms of the contract and delivered to the defendant, and he kept it from February, 1824, to the 1st of February, 1827. The business was carried on in the separate name of Sharpe till June, 1826, when he retired from the business, and Robson continued to carry it on. On the 30th of June, 1826, Robson addressed the following letter to the defendant: "SIR, I beg leave respectfully to inform you, that the partnership between Mr. Sharpe and myself, as coachmakers, carried on under the name of Sharpe only, at No. 19, South Street, is now dissolved, and the whole of the partnership property having been sold by public auction on the 28th and 29th instant under an order of the Court of Chancery, I have become the purchaser of the chariot now in your service, pursuant to contract, and will do myself the honour of waiting on you without delay, to receive your commands relative thereto, and also to give any explanation you may require. I beg at the same time to inform you, \*that the business will in future be carried on by me as usual on the same premises." The defendant, in answer, informed Robson that the agreement for the hire of the carriage had been entered into with Sharpe only; and that, as he (defendant) did not choose to continue the job with any other person, the carriage would be returned on the 2nd of February, 1827, the end of the then current year. On the 21st of December, 1826, the plaintiff Sharpe was told by the defendant that he was ready to continue the job with him according to the contract to its termination, or would return the chariot to him at the end of the then current year; Sharpe said he could not continue the contract, for that he had no longer any thing to do with it, as all the partnership property belonging to him and Robson had been sold by auction; that the agreement and the chariot jobbed by the defendant had been purchased by Robson, and that if the defendant decided upon returning the chariot at the end of the current year he must send it to Robson, for that he (Sharpe) could not take it in. On the 1st of February, 1827, the chariot was taken to Robson's place of business and left there. The action was brought to recover the price stipulated to be paid for the use of the carriage from that time to February, 1829. Lord TENTERDEN was of

[ \*305 ]

opinion that the action was not maintainable, and directed a nonsuit, but reserved liberty to the plaintiff to move to enter a verdict for 157*l.* 10*s.* A rule *nisi* having been obtained for that purpose,

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*Campbell and White* now shewed cause :

The two plaintiffs cannot sue jointly on this contract. In *Lucas v. De la Cour* (1), a contract was made by one of several partners in his individual capacity, he declaring at the \*time that the subject-matter of the contract was his property alone: and it was held that his declaration was evidence of that fact against all the partners, and, therefore, that they could not sue jointly upon such a contract. Now in this case Sharpe made the contract with the defendant, and the latter did not know Robson to be a partner; he was in fact a mere dormant partner, and a dormant partner cannot maintain an action upon a contract to which he is not a party: *Lloyd v. Archboulde* (2), *Mauinan v. Gillett* (3). But assuming that the two might sustain an action on a contract made by one for the benefit of the firm, it is an answer to this action that one of the two partners in whom the defendant may have reposed a special confidence retired from the firm and became incapable of performing his part of the contract. By the dissolution of the partnership, and Sharpe's leaving the firm, the contract entered into by the latter with the defendant was determined; he had no authority from the defendant to make another contract on his behalf with Robson, and the defendant himself, when applied to for that purpose, refused to have any thing to do with him.

[ \*306 ]

*Hutchinson, contra* :

Sharpe, by his contract, continued liable to Drummond for five years. Nothing which took place between Sharpe and Robson could alter the relative situation of Sharpe and Drummond, or discharge either from his liability on the contract. But Sharpe having contracted on behalf of himself and his partner, an action for the breach of such contract may be maintained in the name

(1) 14 R. R. 426 (1 M. & S. 249).

(3) 11 R. R. 597 (2 Taunt. 325, n.).

(2) 11 R. R. 595 (2 Taunt. 324).

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 [ \*307 ]

of the two. In *Lucas v. De la Cour* (1), the contract was made by one partner in respect of property which belonged to him alone. Here \*the subject-matter of the contract belonged to the firm. The defendant, if he be discharged from his obligation to perform the contract during the last two years, by reason of Sharpe's having quitted the firm, will have an undue advantage; for he will then have had the carriage during the first three years, when it was in good condition, and will not be bound to keep it during the last two, when it must be worse for wear.

LORD TENTERDEN, Ch. J. :

It is unnecessary to decide whether if Sharpe had continued in the partnership till the expiration of the five years during which the contract made by him was to continue in force, the action in the joint names of him and his partner might not have been maintained. Here, after the partnership between Robson and Sharpe had ceased to exist, and after Sharpe had ceased to carry on the business of a coachmaker, the defendant offered to continue the job with Sharpe, but he replied that that was impossible. Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person. On that ground I think the nonsuit was right. The rule for setting it aside must therefore be discharged.

LITLEDALE, J. :

The nonsuit was right. I am disposed to think there was no objection to Robson and Sharpe suing on a contract made by Sharpe only on behalf of himself and his partner; but, as to the other \*point, I think this contract was personal, and that Sharpe having gone out of the business, it was competent to the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he

[ \*308 ]

(1) 14 R. R. 426 (1 M. & S. 249).

reposed in Sharpe ; and at all events had a right to his services in the execution of it.

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DRUMMOND.

PARKE, J. :

This appears to me to be a very clear case. The defendant made his contract with Sharpe by name, and not knowing that any other person had an interest in the subject-matter ; and although Robson had an interest in it so as to entitle him to sue jointly with Sharpe, the defendant has the same rights against Sharpe and his partner, and may make the same defence to this action brought by them as if he had contracted with Sharpe alone, and the action had been brought by him. The contract was to continue for five years. At the end of the third year there was a dissolution of partnership between Sharpe and Robson, and notice of that dissolution, and of Sharpe having assigned all his interest in the contract to Robson, was given to the defendant, who said he would not continue the contract with Robson. The very fact of Sharpe's having transferred his interest in the contract to Robson (a mere stranger as far as the defendant was concerned) was equivalent to saying (that which he did afterwards say), I will not perform my part of the contract ; and that is an answer to the present action brought in the names of Sharpe and Robson ; for the defendant had a right to have the benefit of the judgment and taste of Sharpe to the end of the contract, and which, in effect, he has declined to supply. It is true that the defendant will have an advantage which he would not \*have had if the contract had continued for the whole five years ; for he will have had the use of the carriage during the first three, and will not be bound to keep it during the last two, when it must be worse for wear ; but this arises from the default of one of the plaintiffs in not performing his part of the contract.

[ \*309 ]

PATTESON, J. :

This case appears to me to admit of no doubt. It is, in substance, a case where a person having made a contract in his own name attempts to back out of it, and transfer it to a third person. That he had no right to do. The rule for setting aside the nonsuit must be discharged.

*Rule discharged.*

1831.  
May 4.  
 [ 328 ]

# GOOD v. CHEESMAN (1).

(2 Barn. & Adol. 328—335; S. C. 9 L. J. K. B. 234; S. C. at Nisi Prius, 4 Car. & P. 513.)

A debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor), to accept payment by his covenanting to pay two thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the engagement :

Held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest; and as there appeared no failure of performance on the part of the debtor.

ASSUMPSIT by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the sittings in London after Trinity Term, 1830, it was proved, on behalf of the defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum : “ Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of \*our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829.” It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than

[ \*329 ]

(1) Cited and followed (per BRAMWELL, B.) in *Slater v. Jones* (1873) L. R. 8 Ex. 186, 193, 42 L. J. Ex. 122, 127; *Lewis v. Leonard* (C. A. 1880) 5 Ex. D. 165, 168, 49 L. J.

Ex. 308, 311; and by Lord BLACKBURN in *La Société Générale de Paris v. Geen* (H. L. 1883) 8 App. Cas. 606, 614, 53 L. J. Ch. 153, 156.—R. C.

the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional 20*l.* per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows: "If you should see Mr. Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavour to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The LORD CHIEF JUSTICE left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, \*but leave was given to move to enter a verdict for the plaintiff. A rule *nisi* having been obtained accordingly,

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v.  
CHEESMAN.

[ \*330 ]

*Scotland* now shewed cause:

The objection taken is, that the supposed agreement for forbearance in this case is an accord without satisfaction; that the consideration for the plaintiff's alleged promise to give time and take his debt by instalments having altogether failed, his engagement to that effect is no answer to the present action. But this is not a case of accord, strictly speaking; nor is it to be governed by the rigid technical rules applicable to that subject. It is the substitution of a new contract, by which the creditors who are parties to it agree to suspend the remedy for the recovery of their respective demands. Such agreements have been supported in modern cases; and there is a sufficient consideration; for where several creditors join in an undertaking of this kind, it is a good consideration to each that the rest subscribe, and, in

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so doing, give up a part of their present rights for the general advantage : and every one is bound unless he can shew that the debtor has refused to fulfil the agreement : *Boothbey v. Sowden* (1). Here the first act in fulfilment of the contract, namely, the nomination of a trustee, was to be performed by the creditors ; and this, at all events, ought to have been done before they could consider themselves as remitted to their former rights by any failure on the part of the debtor : *Tatlock v. Smith* (2). But no such failure has in fact been shewn ; for the defendant's letter, which was read at the trial on behalf of the plaintiff to prove that the defendant had abandoned the contract, \*proves the contrary. The ground on which a creditor, having joined with others in admitting the debtor to a composition, is precluded from afterwards suing him, is the fraud which would thereby be practised on the rest of the creditors : *Butler v. Rhodes* (3), *Wood v. Roberts* (4). The same principle may be deduced from *Cockshott v. Bennett* (5), and *Steinman v. Magnus* (6). It is true, in the present case, the agreement was not signed by the defendant ; but his adoption of it is shewn by his subsequent letter, and by his procuring the paper to be stamped.

[ \*331 ]

*Follett, contra :*

The main answer to this defence is, that the accord, if any, was without satisfaction, and the defendant was never released. The agreement of the four creditors was altogether executory, and nothing was done upon it : there is no ground, therefore, for arguing, as in some of the cases cited, that the plaintiff has induced others to join him in an act, from the consequence of which he now seeks to relieve himself individually. None of the creditors were bound unless the agreement was carried into effect. When accord and satisfaction are pleaded, it is quite usual to traverse the averment of acceptance ; and this is a complete answer to the plea. Here no acceptance had, in fact, taken place before the action was brought ; the creditors, therefore, were not bound ; and while a bargain is *in fieri* any party may

(1) 3 Camp. 175.

(2) 6 Bing. 339.

(3) 1 Esp. 236.

(4) 2 Stark. 417.

(5) 1 R. R. 617 (2 T. R. 763).

(6) 11 East, 390.

retract, if he has not as yet altered the situation of third persons. Where third parties are not affected, a creditor, agreeing by parol to take a less sum than his entire debt, is not thereby precluded from afterwards suing for the whole. In *Heathcote v. \*Crookshanks* (1) it was held that such an agreement among the creditors, not having been followed by actual acceptance, was not obligatory.

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[ \*332 ]

(LITLEDALE, J. : It was observed there by BULLER, J. that no fund was appropriated for the payment of the debt; and that if the debtor had assigned over all his effects to a trustee for distribution among the creditors, that would have been a good consideration for a promise of forbearance.

PARKE, J. : It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did.)

Still it was a question discussed by the Court, whether an agreement to forbear, under such circumstances, was binding; and they thought it was not. Lord ELLENBOROUGH lays it down in *Steinman v. Magnus* (2), that, in the absence of fraud on other parties, a simple agreement by a creditor to accept less than his just demand will not bind him. The non-completion of the agreement in the present case was the fault of the defendant; for, according to *Cranley v. Hillary* (3), (where Lord ELLENBOROUGH seemed inclined to reconsider his former opinion in *Boothbey v. Sowden* (4),) the person to be discharged is bound to do the act which is to discharge him, and not the other party. It was his business to seek out the creditors, procure the nomination of a trustee, and tender the necessary securities. If the defendant, instead of the general issue, had pleaded accord and satisfaction, it would not have been sufficient to shew a parol agreement by the plaintiff and other creditors to receive less than their demands; the defendant must have averred an execution by himself of an assignment or warrant of attorney, or something tantamount, \*in fulfilment of his part of the accord, and an acceptance by

[ \*333 ]

(1) 2 T. R. 24.

(3) 2 M. & S. 120.

(2) 11 East, 393.

(4) 3 Camp. 175.

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them: for "every accord ought to be full, perfect, and complete;" and "if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance:" *Peytoe's case* (1).

LORD TENTERDEN, Ch. J.:

Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition \*with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

[ \*334 ]

LITTLEDALE, J.:

This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as

might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney: if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks* (1). And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

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v.  
CHEESMAN.

PARKE, J. :

I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner \*there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in Com. Dig. Accord (B 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shewn that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

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(1) 2 T. R. 24.

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v.  
CHEESMAN.

PATTESON, J. :

The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

*Rule discharged.*

1831.  
May 5.

EX PARTE ANN FARLOW, IN THE MATTER OF THE  
HUNGERFORD MARKET COMPANY.

[ 341 ]

(2 Barn. & Adol. 341—349; S. C. nom. *Rex v. Hungerford Market Co.*,  
9 L. J. K. B. 255.)

By statute 11 Geo. IV. c. lxx. the Hungerford Market Company are empowered to purchase certain property, and the leases, &c. of premises on it; and the lessees and tenants for years or at will are to give up possession at three months' notice, but compensation is to be made to any such tenant required to quit before the expiration of his term. Sect. 19 provides, that all tenants for years, from year to year, or at will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act," shall be entitled to compensation, to be assessed, if necessary, by a jury.

A tenant from year to year was ejected by the Company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession; and that the tenancy was not likely to have been determined if the Act had not passed: Held, that she was entitled to compensation for the whole marketable interest which she had in the premises at the time when the Act passed; and that the good-will, though of premises on so uncertain a tenure, was protected by the Act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave.

In a case said to come within the protection of the Act, where the Company had brought ejectment, the Court refused to stay proceedings till compensation should be made, or a jury summoned.

THE *Attorney-General*, in Hilary Term, obtained a rule *nisi* for a *mandamus* to the Hungerford Market Company, to cause a jury to be summoned according to the statute in that behalf, to assess compensation for the injury which Ann Farlow would

sustain by being obliged to leave certain premises occupied by her in Little Hungerford Street, in or near the Hungerford House estate, which premises the Company had purchased of the Rev. Henry Wise; "and for loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise," which the said Ann Farlow might sustain by reason of the passing of the Act.

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The Company was incorporated by statute 11 Geo. IV. c. lxx., for the purpose of re-establishing (on a more extended plan) the market originally granted by King Charles II. to Sir Edward Hungerford, K.B., and his heirs, to be holden within a certain messuage called Hungerford House or "Hungerford Inn," in or near the \*Strand. The Act, after reciting that the Company had contracted to purchase the premises called Hungerford Market, wharf and stairs, &c. empowered them to buy in any of the subsisting leases or agreements for leases on any part of the said premises. And by sect. 17 it was enacted, that every lessee or tenant for years or at will, and every other person in possession of any messuages, &c. which should be purchased by virtue of the Act, should deliver up possession to the Company at three months' notice, the Company making such compensation to the tenant or lessee, in case he should be required to quit before the expiration of his term, as they should think reasonable; and that in case of dispute the compensation should be settled by a jury, to be summoned as the Act directed. Section 19 provides, that all or any person or persons, tenant or tenants for years, from year to year, or at will, occupier or occupiers of any part of the market and other hereditaments forming the said estate called Hungerford House, &c. or therewith contracted to be purchased by the Company, who "shall or may sustain or be put unto any loss, damage, or injury, in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act," shall receive compensation from the Company in the manner prescribed by a former section, namely, by the assessment of a jury, if terms cannot otherwise be agreed upon.

[ \*342 ]

Ann Farlow was the widow of a person who had carried on

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[ \*343 ]

the business of a carman and lighterman on premises forming part of the estate purchased by the Company. It did not appear that he had any lease ; but he and his father had been tenants of the property in question for sixty years. The widow occupied them \*from the time of her husband's death, as tenant from year to year, and continued the business. At Midsummer, 1830, after the passing of the Act, she, and other yearly tenants on the estate, received notice to quit ; and she, in consequence, required the Company either to give her compensation for the damage she would sustain by being turned out of the premises, or to summon a jury according to the Act. In support of the present rule it was sworn, that the loss to this party, in respect of connection and other local advantages, would be very great ; that her husband had laid out large sums of money on the premises, being assured by the then proprietor, from whom the Company purchased, that he should not be disturbed in his possession as long as the rent was duly paid ; which had been done both before and since his death. On the expiration of the time specified in the notice to quit, an ejectment was brought on behalf of the Company ; and while this rule was depending they recovered possession. Affidavits were filed by the Company in opposition to the rule, but were not used, the Court being of opinion that they came too late.

*Sir James Scarlett and Follett now shewed cause :*

[ \*344 ]

There is no ground for the claim of compensation. This is not a proceeding under the statute, but by regular notice to quit at the expiration of the year. Section 17 expressly provides that compensation is to be given where a tenant shall be required to quit before the expiration of his term ; and although section 19 directs that recompense shall be made to all tenants sustaining injury in respect of any interest whatsoever for good-will, &c. by reason of the passing of the Act, that \*can only extend to legal interests. Here no legal interest could subsist after the expiration of the notice to quit ; the tenancy was determined by the ordinary course of law, as it might have been if the statute had never passed. As to the fixtures there will be no dispute.

The *Attorney-General and Law, contra* :

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FARLOW.

The Company only exists by the Act of Parliament; and it was clearly the object of the Legislature to take care, while establishing them, that no injury should in any respect accrue to a large body of persons who had long been carrying on trade upon this property. The enactment of section 19 is large and novel: it provides compensation for all persons who shall suffer in any interest for good-will, &c. which they now enjoy; that is, at the passing of the Act. At that time the party making the present application enjoyed an interest which, though nominally subsisting but from year to year, might in reality be considered permanent, but for this statute; and would have been treated as such in any bargain with a purchaser. She is therefore entitled to compensation for a substantial-marketable interest which then existed, in the good-will, improvements, and tenant's fixtures, and which interest was disturbed, and its value taken away, by this Act of the Legislature. Section 17 only refers to tenants dispossessed before their terms expire; section 19 must have some additional meaning, and can only be understood as referring to the kind of interest which is here in question.

LORD TENTERDEN, Ch. J.:

I am of opinion that in this case a *mandamus* ought to go. It appears by the statute that a contract had been made by a new Company\* to purchase a very considerable estate, used as a market. The Act empowers them, when the estate shall have been conveyed, to treat for, purchase, and take any of the subsisting leases, or agreements for leases, of or in any part of the premises; and by section 17 it is enacted that every lessee or tenant for years, or at will, of any premises which shall be purchased by virtue of the Act, shall deliver up possession to the Company upon three months' notice to quit, compensation being made (which in case of dispute is to be settled by a jury), if any such tenant be required to quit before the expiration of his term. Then comes the nineteenth section; and this appears to me, on the whole view of it, to have been intended to provide for that feeble and imperfect interest which many occupiers had in the premises to be contracted for by this Company. It was likely to

[ \*345 ]

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FARLOW.

[ \*346 ]

be foreseen by the Legislature that when the Company was established, and the proceedings taken which this Act had in view, many occupiers of premises in the old market would be dispossessed; and if it was considered that this might be done in the ordinary way, by ejectment, and that the parties should then have no right or claim against the Company, I do not see why the nineteenth section should have been framed. That section is certainly obscure, and incorrectly worded; but it provides compensation for all persons who shall sustain any damage or injury, "in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act." Now it seems perfectly clear that if this Act had not passed, the tenants and occupiers would not have been all dispossessed, as they will be under the Act. It is said "the interest \*which they now enjoy" must be taken to mean a legal interest, and that all legal interest was determined by the notice to quit. But I think this is not the fair meaning of the words, and that they must be understood as signifying that sort of right which an occupier ordinarily has, of parting with his tenancy to another person for such sum as he may be induced to give for good-will, fixtures, and improvements, and which is often very considerable though the tenancy be only from year to year, where there is a confidence that it will not be put an end to. This interest, feeble as it may be (since it is always determinable at a short notice), may justly be considered as matter of value to the owner, and to any other party who becomes the purchaser. In a transaction between landlord and tenant, the "good-will" could not be a subject of consideration. I think, therefore, that the word "interest" in the nineteenth section must be understood, not of a strict legal interest, but of that which in common parlance is called interest in the good-will, and which is usually a subject of sale between an occupier and a person about to come into his place, however infirm the right may be, and however short the legal term of enjoyment.

LITLEDALE, J.:

The section is obscure; but reading it as if the words "by reason of the passing of this Act" came after the words "damage

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or injury," the only question is, whether this person has been put to any loss, damage, or injury, by reason of the passing of the Act, in respect of any interest for good-will or otherwise, which she then enjoyed? When the Act passed she had at least a term of six months unexpired in the premises; she had therefore some interest in the good-will at that time; \*and she has been deprived of it by reason of the passing of the Act. It is perhaps true, that in strict legal consideration there may be no interest in a good-will; but we know that there is practically such an interest, which is usually a subject of sale. That interest the Legislature seems to have contemplated in this section; and it was one which this party, though only a yearly tenant, would in all probability have continued to enjoy undisturbed if the Act had not passed. The amount of compensation, however, will be for a jury. I think the *mandamus* ought to go.

[ \*347 ]

PARKE, J. :

If the Company could have purchased these premises without the assistance of an Act of Parliament, no doubt they might have turned out the present applicant without any compensation, but such as she might have been entitled to by her bargain with the landlord from whom they purchased. But they have come to Parliament to be made a corporation, and to be invested with peculiar powers; and the Legislature appears to have intended that the occupiers of the old market should not suffer by the exercise of these powers without a compensation for such interests as would be affected by the Act. The only doubt I have had was, whether the language used was sufficient to carry the intention into effect; but I think the words of the nineteenth section are so. It cannot have been intended merely to place the tenant in the same situation with respect to the Company as he would have been with the landlord at the determination of his tenancy, for any provision to that effect would have been unnecessary; and, besides, the tenant has no "interest for good-will" as against the landlord. It seems to me that the enactment \*was meant to apply to the state of things at the time of passing the statute, and to give compensation for the power which the occupier then had to dispose of the good-will and other

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FABLOW.

advantages in the usual manner to an incoming tenant, in the expectation that the tenancy would not be put an end to. The object appears, on the whole, to have been, that the tenant should be placed as far as possible in the same situation as if the Act had not passed.

PATTESON, J. :

I have also had some difficulty in the construction of this clause, but I think the words "any interest for good-will" clearly shew that the Legislature did not contemplate a legal interest as between landlord and tenant; for no interest in the good-will could be insisted upon against a landlord, who, at the time of passing the Act, would have been entitled to put an end to the tenancy at half a year's notice. Then, as the words must have some signification, I think they must be understood to mean that the Company is to make compensation to the tenant in the same manner as an ordinary purchaser taking a yearly tenancy with the incidents commonly attending it.

*Rule absolute.*

[ \*349 ]

A similar rule *nisi* for a *mandamus* to the Company was obtained on the part of Joseph Wright, another tenant of premises in the market, on affidavits nearly resembling those made use of in the above case. *Sir James \*Scarlett and Follett* shewed cause in Trinity Term, 1831, and the *Attorney-General* and *Law* were heard *contra*; but it appeared, on the affidavits now filed by the Company, that the party applying had held under the landlord, Mr. Wise, of whom the Company purchased, on an agreement for one year certain from Michaelmas, 1822, with liberty to the landlord afterwards to determine the tenancy in any year at three months' notice, and with a stipulation also that the tenant should not underlet or give up possession of the premises without leave in writing. The Court was of opinion that these conditions of holding, especially the last, essentially distinguished this case from the preceding, and the rule was discharged; as also were two other rules obtained under circumstances not materially differing.

In the following Michaelmas Term *Kelly* obtained a rule on

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the application of a party named Lee, against whom the Company had brought ejectments, under similar circumstances to those last stated, calling on the lessors of the plaintiff to shew cause why proceedings should not be stayed till they should have made compensation to the defendant for his interest, good-will, and fixtures, according to the Act, or summoned a jury for that purpose. *Sir James Scarlett* and *Follett* shewed cause; and *Kelly*, *contra*, insisted that, by the provisions of the Act, the making compensation was a condition precedent to determining the possession. The Court, however, held, that this view of the statute, assuming it to be correct, might form an answer to the action of ejectment, but furnished no ground for the interference of the Court; and this, and three other rules in similar cases, were discharged.

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### HULLETT v. HAGUE.

1831.  
May 5.

[ 370 ]

(2 Barn. & Adol. 370—379; S. C. 9 L. J. K. B. 242; 1 Carp. Pat. Cas. 501.)

A patent was taken out for improvements in evaporating sugar, &c. The specification was as follows: "My invention consists in a method or apparatus as hereinafter described, by which I am enabled to evaporate liquids and solutions at a low temperature, &c. And my said invention and improvement consists in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation; and this I do by means of pipes, whose extremities reach nearly (or within such distance as may be found most suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, the other extremities of such pipes being connected with larger pipes, which communicate with the bellows or other blowing apparatus which forces the air into them." The lesser pipes were to be equally distributed, and their lower ends on a level with each other. It was further declared, that the form of the apparatus might be varied, provided the essential properties were maintained: Held, that taking the whole of the specification together, it appeared that the invention consisted of the particular method or process of forcing, by means of bellows, &c. air through the liquid subjected to evaporation, viz. by pipes connected with larger pipes, and placed as mentioned in the specification; and, therefore, that it was not void because another patent had been before granted to other persons for effecting the same object, by a coil of pipes (lying at the bottom of a vessel), perforated with small holes, or by a shallow cullender placed at the bottom of the vessel.

THIS was an action for the infringement of a patent, of which the plaintiff was the assignee. Plea, not guilty. At the trial

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before Lord Tenterden, Ch. J., at the London sittings after last Hilary Term, the plaintiff produced a patent, dated the 27th of November, 1828, granted to one Kneller, for certain improvements in evaporating sugar (which improvements were also applicable to other purposes), and the following specification: "I W. G. Kneller do declare that my invention consists in a method or process, and certain apparatus as hereinafter described, by which I am enabled to evaporate liquids and solutions at a low temperature, and thereby to avoid the injury to which certain substances which require a nice and delicate application of heat, such as sugar, for instance, are liable by being exposed to too high a temperature; and I do further declare, that my said invention and improvement consists in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation, and this I do by means \*of pipes, whose extremities reach nearly (or within such distance as may be found suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, the other extremities of such pipes being connected with larger pipes which communicate with the bellows, or other blowing apparatus, which forces the air into them. The pan or boiler may be of any shape or dimensions, but I prefer it with a flat level bottom, and I introduce the liquid or solution to the depth of from about four to six inches. The heat may be applied to the lower or exterior area of the bottom of such pan or boiler, by naked fire, steam, or hot air in the usual manner, and by means well understood; the air then forced into the heated liquid or solution keeps it in a constant agitation, abstracts its heat, and carries off the steam or vapour, which is to be expelled by raising the degree of heat under the pan or boiler, and increasing the quantity and velocity of the air injected into the liquid or solution; or, on the contrary, by lowering the heat and moderating the injection of air, the evaporation is retarded at the pleasure of the operator." The specification then, after describing at what degree of temperature this might be done, proceeded as follows: "And I further declare that this my invention may be applied to the evaporation of other liquids as well

as sugar, and that the form or construction of the apparatus which I use to produce the above effect may be varied according to circumstances, and the form or position of the pan to which it is to be applied: but two things are essential in its construction; the first of which is, that however numerous the blowing pipes may be, their lower orifices should be distributed as \*evenly and equally over the whole surface of the bottom of the pan as possible; and, secondly, that a stream of air should issue from the lower end of every one of them at the same time. To ensure this latter object it is immaterial, whether the bottom of the pan or boiler be perfectly level, but it is quite necessary that all the lower ends of the blowing tubes should be on a level and parallel to the surface of the fluid to be evaporated, in order that there may not be a higher column of fluid in one tube than in another. The mode of construction necessary to produce these objects may be various, but in order the more distinctly to explain my meaning and my mode of operating, I hereunto subjoin a drawing of the apparatus which I have used, and find to answer the purpose." (The drawing was annexed to the specification.) "The form of this apparatus may be varied, provided its essential properties of the air blowing through all the descending tubes, and their being so disposed as to produce greatly divided and equally distributed currents of air over the whole bottom of the vessel at once, are maintained; because my invention consists in producing rapid evaporation at lower temperature than usual by the means hereinbefore described."

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This specification having been read on the part of the plaintiff, the defendant put in another patent, under which he acted, granted to Richard Knight and Rupert Kirk on the 9th of May, 1822, entitled "a patent for the invention of a process for the more rapid crystallization and for the evaporation of fluids at comparatively low temperatures, by a peculiar mechanical application of air;" and the specification was as follows: "We, the said Richard Knight and Rupert Kirk, do by these presents particularly describe and \*ascertain the nature of our said invention, and in what manner the same is to be performed, as follows; that is to say," (They then stated the inconveniences resulting from the common process of boiling fluids by the too rapid access

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of heat, and proceeded as follows :) “ To obviate this and similar difficulties, and also for the purpose of facilitating the process of evaporation of fluids in general, we declare this our invention to be peculiarly adapted, and we do hereby set forth and describe the means by which we effect the same ; that is to say, we propel a quantity of heated air into the lower part of the vessel containing the liquor, syrup, or fluid, whether in a cold or heated state, and cause such heated air to pass through the whole body of the liquor in finely divided streams. The means used by us for heating and applying the air to the fluid are as follows ; that is to say, a quantity of air is propelled (by means of a blowing-engine, bellows, or other machine used for propelling air,) through a pipe or pipes (made of lead, copper, iron, or other fit material,) into the lower part of the copper pan or vessel containing the heated syrup, liquid, fluid, or other matter to be operated on, coiled or otherwise shaped and accommodated to the nature or form of the vessel ; the said coil of pipe within and lying at the bottom of the said vessel being perforated with a number of small holes ; the heated air being thus forcibly driven out in minutely divided currents, passes rapidly through the liquid, and according to the quantity and temperature of the air so passing through the liquid, a greater or less quantity of the liquid will be converted into vapour and carried off with the air. In lieu of the perforated pipe, a shallow metallic vessel, of the nature of a cullender, within the boiler, may be connected with the \*air pipe ; and the cullender being perforated with small holes, the heated air may be driven through this perforated cullender, or any similar contrivance that may best suit the form of the vessel, or the nature of the fluid or material to be acted upon.”

[ \*374 ]

The specification then described how the heat might be applied, and proceeded thus : “ We further declare, that our invention consists in the application of currents of heated air, when forced or made to pass through the body of any fluid for the purpose of producing or facilitating evaporation ; and we also declare, that the same may be advantageously applied to processes dependent upon the disengagement of aqueous vapour during the evaporation, concentration, and crystallization of various substances when dissolved in fluids, as in the manufacture of sugar, glue,

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salt, alum, soap, tallow, and similar processes." It was contended by the defendant's counsel that the patent assigned to the plaintiff was void: first, because the assignor claimed, according to his specification, the merit of the same invention for which Knight and Kirk had obtained a patent several years before; the object of both patents being the same, viz. the causing of evaporation by means of streams of atmospheric air introduced in any vessel near the bottom of the liquid; and the means also the same, viz. forcing the air through the liquid by bellows or other blowing machines. Secondly, supposing that the process described in the plaintiff's patent was an improvement on that pointed out in Knight and Kirk's specification, it was said that Kneller should have confined his patent to that improvement only. Lord TENTERDEN was of opinion that although the object to be effected by the two patents was the same, the means of effecting it were different; \*and that the patent granted to Kneller must be considered as one granted for effecting that object by the particular method described in the specification. A verdict was found for the plaintiff, but liberty reserved to the defendant to move to enter a nonsuit.

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*Campbell*, on a former day in this Term, moved accordingly :

First, the object as well as the means of carrying the process into effect are the same in both patents. By the specification of the first patent, Knight and Kirk declare their invention to consist in propelling a quantity of heated air into the lower part of the vessel containing the fluid, and causing such heated air to pass through the whole body of the liquor in finely divided streams, by means of the perforated coil of pipe or cullender, particularly described, "or any similar contrivance that may best suit the form of the vessel or the nature of the fluid." And the invention is further declared to consist "in the application of currents of heated air, when forced or made to pass through the body of any fluid for the purpose of producing or facilitating evaporation." In like manner, the specification of the second patent (Kneller's) declares that invention to consist "in forcing, by means of bellows or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid

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subjected to evaporation." This Kneller claims as an original invention, and not as an improvement of a former invention. He then proceeds in a distinct sentence to point out, by way of illustration, one method of effecting his object; "and this I do by means of pipes," &c. ; and he gives a description of his apparatus, concluding by stating, that "the form \*of this apparatus may be varied, provided its essential properties of the air blowing through all the descending tubes, and their being so disposed as to produce greatly divided and equally distributed currents of air over the whole bottom of the vessel at once, are maintained ; " because the invention consists in producing rapid evaporation at a lower temperature than usual by the means before described.

In both specifications, therefore, the invention claimed is that of forcing the air through the body of the fluid in finely divided streams, for the purpose of producing or facilitating evaporation. Neither of them can be considered as patents granted only for the particular apparatus described in each, for in each specification the particular apparatus described is only given by way of illustration of the mode of applying the principle of the invention, and is not confined to that particular form of apparatus. Knight and Kirk's specification describes the object as to be effected by the coil of perforated pipe, or cullender, "or any other contrivance that may suit the form of the vessel or the nature of the fluid to be acted upon." And Kneller's specification also, after describing the method of effectuating the invention, states it to be that of forcing air, either in a hot or cold state, through the liquid subjected to evaporation, by means of an arrangement of main pipes and branch pipes, descending or dipping into the fluid. And here, too, the patentee does not confine the invention to that particular system of apparatus, but expressly states that the form of this apparatus may be varied, provided its essential properties are maintained, "because," it goes on to say, "my invention consists in producing rapid evaporation at lower temperatures than usual, by the means \*hereinbefore described." Kneller should have stated his invention to consist in having the mains to feed the smaller pipes, and should have described it as an improved method of supplying those smaller pipes, (to be introduced into the liquid,) for the purpose of producing evaporation.

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But he has taken out a patent for doing that which might lawfully be done by the patent granted to Knight and Kirk. He has not confined himself by the words, “and this I do by means of pipes,” to that particular method there pointed out; he claims, as his invention, the principle of producing evaporation at a low temperature, by forcing, with a blowing apparatus, a stream of air through the liquid.

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But assuming that, after the verdict, Kneller's patent must be taken to be an improvement upon the method described in Knight and Kirk's patent, Kneller ought to have taken out his patent for that improvement only: *Lord Cochrane v. Smethurst* (1), *Boulton v. Bull* (2), *Bovill v. Moore* (3), *Hill v. Thompson* (4), *Campion v. Benyon* (5).

LORD TENTERDEN, Ch. J. :

We will consider this case, and give our judgment on a future day. I cannot forbear saying, that I think a great deal too much critical acumen has been applied to the construction of patents, as if the object was to defeat and not to sustain them.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., now delivered the judgment of the COURT :

After stating the patent granted to Knight and Kirk, and the specification, his Lordship proceeded as follows :

This was, in substance, an invention of a process for the more rapid crystallization and for the evaporation of fluids at comparatively low temperatures; this object being effected by means of a coil of pipes lying at the bottom of the vessel, perforated with small holes, and thus operating on the liquid, or by a shallow cullender placed at the bottom of the vessel. It was proved, that a pipe employed and acted upon in the manner described in the specification, viz. by forcing the air at the end of it, would accomplish that object.

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(1) 18 R. R. 761 (1 Stark. 205).

(4) 17 R. R. 156 (3 Mer. 622).

(2) 3 R. R. 439 (2 H. Bl. 463).

(5) 23 R. R. 549 (3 Brod. & B. 5).

(3) 17 R. R. 514 (2 Marsh. 211).

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[ \*379 ]

The patent on which the plaintiff relied, and for the infringement of which this action was brought, was for certain improvements in evaporating sugar, which improvements were also applicable to other purposes. By the specification, Kneller declares that his invention consists in a method or process, and certain apparatus as hereinafter described. He does not claim as his invention the principle, but the apparatus, by which the principle of causing evaporation is to be carried into effect; for he states that, by his apparatus, he is enabled to evaporate liquids and solutions at a low temperature. It is evident that the object of the two patents is the same. But the mode of effecting that object is different. The specification continues, "and I further declare that my said invention and improvement consists in forcing, by means of bellows or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation." Now it was said, that the words which immediately follow, "and this I do by means of pipes," constituted a separate and distinct sentence from those which immediately preceded them, and that the patentee had stated his invention in the preceding sentence, and \*had claimed the same invention as that described by Knight and Kirk in their specification. But we think that the words, "and this I do by means of pipes," &c., must, in conjunction with those which immediately precede them, be taken to form one entire sentence, and that they amount altogether to an allegation on the part of the patentee, that his invention consisted of the method or process of forcing by means of bellows or any other blowing apparatus, hot or cold air through the liquid subjected to evaporation, this being effected by means of pipes placed as directed in the specification. Now the method described in Knight and Kirk's patent appears to us to be perfectly different. It is either to have a pipe, accommodated to the form of the vessel, or a cullender, placed at the bottom of the vessel. The method described in the plaintiff's specification is to have a large horizontal tube (near the surface of the liquid), into which there are introduced a number of small perpendicular tubes, descending through the liquid to the bottom of the vessel, and

having their lower ends exactly on a level, and parallel to the surface of the fluid. The air is then forced by the blowing apparatus from the open end of the large tube to the other end which is closed, and as soon as the large tube is filled the air descends through the smaller tubes to the bottom of the vessel, and bubbles up through the liquid, and the evaporation is thereby kept up constantly and equally in all parts. It appears to us that that is a method or apparatus perfectly distinct from the other, and for that method and apparatus the patent was taken out. We are of opinion, therefore, that there should be no rule in this case.

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*Rule refused.*

### PHILLIPS v. HEADLAM.

(2 Barn. & Adol. 380—385; S. C. 9 L. J. K. B. 238.)

1831.  
May 5.

[ 380 ]

A ship insured at and from Liverpool to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot; but no pilot having come on board, about ten o'clock at night he attempted to enter the river without one, and in so doing the ship took the ground and was lost. The Judge left it to the jury whether the captain, in entering without a pilot, did what a prudent man ought to have done under the circumstances. The jury were of that opinion, and found for the plaintiff. On motion for a new trial on the ground that the verdict was against evidence: Held, that the underwriters were liable, and would have been so although the captain had been wrong in attempting to enter the port without a pilot; he being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion *bonâ fide* under the circumstances.

THIS was an action upon a policy of insurance at and from Liverpool to the ship's port or ports of discharge in Sierra Leone, and during her stay there, and from thence to her port or ports of discharge in the United Kingdom. At the trial before Bayley, J., at the Summer Assizes for the county of Lancaster, 1829, it appeared that the ship sailed on the voyage insured, and arrived at three o'clock in the evening of the 30th of January off the river Sierra Leone, where there is a regular establishment of pilots; that the captain then hoisted a signal for a pilot, and that at ten o'clock, no pilot having come on board, the captain attempted to enter the river, and in so doing

PHILLIPS     the vessel struck the ground, and was lost. It was proved to be  
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 HEADLAM.     usual for vessels, either coming out of or going into the river,  
 to take a pilot, and the defendant's evidence went to shew that  
 it was not necessary or proper for the captain to enter the  
 river without a pilot. Upon this point there was contradictory  
 evidence. BAYLEY, J., desired the jury to find for the plaintiff,  
 if they thought that the captain, in entering the harbour without  
 a pilot, did what a prudent man ought to have done under the  
 circumstances; otherwise for the defendant. The jury having  
 found for the plaintiff, a rule *nisi* was obtained for a new trial,  
 on the ground that the verdict was against evidence.

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*F. Pollock* now shewed cause :

The question left to the jury was more favourable to the defendant than it ought to have been. For, assuming the captain to be a man of competent skill, the underwriters are liable for a loss arising immediately from a peril of the sea, though remotely from the negligence or mistake of the captain or crew: *Busk v. The Royal Exchange Assurance Company* (1), *Walker v. Maitland* (2). But here the jury found that the captain acted *bonâ fide*, and as a prudent man ought to do under the circumstances, and the evidence fully warranted the finding. (He then commented on the evidence, and observed that there might be circumstances to render it prudent for the captain to enter a port without a pilot where the navigation usually required one, and that it was sufficient in this case that the measure, in his judgment, was necessary and proper.)

*Joshua Evans, contra :*

It is clearly established law, that where there are pilots, and the navigation requires one, a ship going without one is not seaworthy: *Law v. Hollingsworth* (3). Lord KENYON there says, "It is one of the things implied in contracts of this kind (policies of insurance), that there shall be some person on board the ship apparently qualified to navigate her." That

(1) 20 R. R. 350 (2 B. & Ald. 73).     177 (7 B. & C. 219).

(2) 24 R. R. 320 (5 B. & Ald. 171).     (3) 7 T. R. 160.

And see *Bishop v. Pentland*, 31 R. R.

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was the case of a ship entering a harbour where a pilot was required, and is therefore in point. Lord TENTERDEN, in his treatise on the Law of Merchant Ships and Seamen (p. 148), speaking of pilots established at places in this country, says that, in general, the master of a ship engaged in a foreign trade must put a ship under the \*charge of such a pilot, both in his outward and homeward voyage, within the limits of every such establishment. Extreme necessity only could justify the entering of a port without a pilot. (He then commented on the evidence, and contended that the proceeding of the captain in this respect was neither necessary or proper.)

[ \*382 ]

LORD TENTERDEN, Ch. J.:

The rule for a new trial must be discharged. If the loss happened even in consequence of the mistake of the master (provided he were a person of competent skill at the time when the policy was effected), the underwriters are chargeable. The case therefore was left to the jury most favourably for the defendant; and at all events he will not be entitled to a new trial, unless it be on the ground that the master was bound by law not to enter the harbour without a pilot. *Law v. Hollingsworth* (1) was the case of a ship homeward bound to the port of London, and which had received a pilot at Orfordness, but dropped him before she reached her moorings in the river Thames; after which, before she was safely moored, an accident happened, and the vessel was sunk. It may be conceded, that a vessel coming out of a harbour must have a pilot, because the captain has it in his power always to procure one; but it seems to me that if the master of a vessel arriving off a port use due diligence to obtain a pilot, he does all that can be required by law. Here the vessel arrived off Sierra Leone about three in afternoon: the captain hoisted signals for a pilot; and at ten no boat or pilot had come off. It seems to me that, upon the evidence, the master did use due diligence to obtain a pilot, and having so \*done, it was competent to him to exercise his discretion, whether it were better to run the risk of entering the harbour without one, or to wait till the following day for

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(1) 7 T. R. 160.

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a pilot. Here, acting to the best of his judgment, he attempted to enter the harbour without one, and in so doing the vessel was lost; and I think that the underwriters are liable for a loss happening under these circumstances. By so holding, I think we shall not establish any rule which can operate to the prejudice of the public, assuming, as we do, that the captain was a person of competent skill.

LITLEDALE, J.:

It was the duty of the master to use due diligence to procure a pilot; and having done so without effect, it was then competent to him to exercise his discretion, whether it would be better to go into the harbour without one or remain where he was. There may, undoubtedly, be circumstances which render it more fit to run the risk of entering a port without a pilot, than to remain outside of the port. Here there was contradictory evidence as to the propriety of the measure adopted by the captain. But if he was a man of competent skill, and acted *bonâ fide*, though erroneously, in attempting to enter the harbour without a pilot, and the ship was thereby lost, the underwriters are not discharged.

PARKE, J.:

[ \*384 ]

The rule of law is, that the assured is bound to have the ship seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, and a master of competent skill and ability to navigate her, at the commencement of the voyage; and if she sail from a port where there is an \*establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. So if in the course of her voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased: *Law v. Hollingsworth* (1). But if a vessel sails to a port where the establishment is such that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all

(1) 7 T. R. 160.

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that it can require in such a case is, that the master use all reasonable efforts to obtain one. If such efforts are used and fail of success, I do not think it material that in the exercise of his discretion in the navigation of the ship, in the absence of a pilot, the master afterwards commits an error by which a loss is incurred, any more than if he does so in any other part of the voyage, always supposing that he is a person of competent skill and ability. In this respect the case falls within the principle of the decisions in *Busk v. The Royal Exchange Assurance Company* (1) and *Walker v. Maitland* (2). In another action on this policy, tried before me at Lancaster, at the Spring Assizes, 1830, I left two questions to the jury; first, whether, by the law or usage of Sierra Leone, a pilot was required? and, secondly, whether the captain made all reasonable efforts to obtain one, and not being able to do so, conducted himself as a man of reasonable prudence, care, and skill, ought to have done? The jury found a verdict for the plaintiff, which the Court, on a motion for a rule *nisi* for a new trial, refused to disturb. \*I was by no means satisfied that, in leaving the latter part of the second question to the jury, I did not put the case more favourably than I should have done for the defendant; and upon subsequent reflection I was satisfied that I did, for the reasons I have before stated. In the present case, also, it seems to me that the question was left too favourably for the defendant; but at all events there was evidence on both sides, and the jury having decided upon that evidence, I think the verdict ought not to be disturbed.

[ \*385 ]

*Rule discharged.*

# DE LA CHAUMETTE v. THE BANK OF ENGLAND (3).

(2 Barn. & Adol. 385—391; S. C. 9 L. J. K. B. 239.)

A promissory note payable to the bearer, made in England, is by the statute of 3 & 4 Anne, c. 9, transferable by delivery in a foreign country.

1831.  
May 6.

[ 385 ]

TROVER for a Bank note. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the London sittings after

(1) 20 R. R. 350 (2 B. & Ald. 73). the same parties, 32 R. R. 643 (9

(2) 24 R. R. 320 (5 B. & Ald. 171). B. & C. 208).

(3) See the former case between

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[ \*386 ]

Michaelmas Term, 1829, the jury found a special verdict, setting out the following facts : One George Haselton, on the 28th of February, 1826, was lawfully possessed of the Bank note in the declaration mentioned ; and whilst he was so possessed thereof, some person or persons to the jurors unknown, on the day and year last aforesaid, feloniously stole, took, and carried away the same from the said George Haselton. The said Bank of England note afterwards was in the hands of M. Emerigue, a money changer of respectability, and of great business at Paris, in the kingdom of France. Messrs. Odier & \*Co., bankers at Paris, being desirous of making a remittance of English money from Paris to the plaintiff, L. A. De la Chaumette, (who then resided and carried on the trade of a merchant in London, and to whom Odier & Co. were then indebted in respect of transactions in business between them, in the sum of 1,700*l.*) afterwards, on the 21st day of May, 1827, purchased from the said M. Emerigue for that purpose, among other English money, the said Bank note, in the usual course of business, and for a valuable consideration, computed at the then rate of exchange between Paris and London. Odier & Co. afterwards, on the 22nd day of May in the same year, in the regular course of business, remitted, on the general account, the sum of 1,008*l.* in English money and Bank notes, whereof the Bank note, so purchased as aforesaid, was one, from Paris to L. A. De la Chaumette, then being in London, who received into possession the last-mentioned Bank of England note, and retained the same in his possession from thence continually, until and at the time of the conversion and disposal of the same, hereafter mentioned. At the respective times of the aforesaid purchase and remittance it was the practice for persons travelling from this country into France to take, for the purpose of paying their expenses, Bank notes ; and for persons residing or domiciled in France to receive the same in payment. At the respective times of the aforesaid purchase and remittance, it was also the usual practice in Paris for bankers or other persons to make remittances from Paris to persons residing in England, in English money and Bank notes ; and for the purpose of making such remittances, to purchase of the money

changers in Paris, at the rate of exchange between Paris and London for \*the time being, English money and Bank notes. After the Bank note in the declaration mentioned had been so remitted as aforesaid, and the said L. A. De la Chaumette had thereupon become possessed of the same in manner aforesaid, the said Governor and Company, at the request and instance of the said George Haselton, converted and disposed of the same to their own use.

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OF ENGLAND.  
[ \*387 ]

The case was now argued by

*Platt* for the plaintiff:

The general rule as to a bill or note assignable by delivery, and lost by theft or accident, is, that the thief or finder may confer a title by transferring it (though if it be assignable by indorsement he cannot): *Miller v. Race* (1), *Grant v. Vaughan* (2), *Peacock v. Rhodes* (3); and the transferee has a good title to it, provided it came into his possession *bonâ fide*, and for a valuable consideration. Here it is found that Odier & Co. took the promissory note in the ordinary course of transfer.

(PARKE, J.: It is not found that the promissory note was transferred in France.)

That is not disputed. (He was then stopped by the Court.)

*Follett, contra*:

The rule relied upon applies to negotiable instruments. If this was a negotiable instrument in France, and the plaintiff gave value for it, he might sue on it, notwithstanding the fact of its having been stolen. If it was not a negotiable instrument there, but a mere chattel or security, like a bond or note not negotiable, no property passed by the delivery, but it remains in Haselton, from whom it was stolen, because the property in such \*a chattel is not altered, except by sale in market overt. Now a promissory note is not negotiable by the custom of merchants, but was made so in this country by the statute 3 & 4 Anne, c. 9. The question here is not, whether that statute applies to render notes made in a foreign country transferable in England when indorsed in this

[ \*388 ]

(1) 1 Burr. 452.

(2) 3 Burr. 1516.

(3) Doug. 611.

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country, as in *Milne v. Graham* (1), *Bentley v. Northouse* (2); but whether a promissory note made in this country and indorsed or delivered abroad passes by such indorsement or delivery. Before the statute of Anne, a promissory note was only evidence of a debt, and not a negotiable security: *Buller v. Cripps* (3). It was not transferable by indorsement or delivery. The preamble of the statute of Anne shews that that was the state of the law. That statute makes promissory notes negotiable in England, in the same manner as inland bills of exchange. It therefore makes them transferable by indorsement in England; but in France, or any other country, a promissory note would continue what it was before the statute, a mere chattel. In *Carr v. Shaw* (4), the Court intimated a strong opinion that the statute did not apply to foreign bills. In *Milne v. Graham* (1), and in *Bentley v. Northouse* (2), a foreign note was held to be negotiable in England by indorsement, because the statute made all promissory notes transferable in England. But the Act did not, and could not, make them transferable in a foreign country. It is not found what the law of France is; and, in the absence of proof to the contrary, which the plaintiff ought to have given, it may be assumed that the law of France does not authorize \*the transfer of a promissory note by indorsement or delivery.

[ \*389 ]

LORD TENTERDEN, Ch. J. :

An inland bill of exchange was transferable here before the statute of Anne, by the custom of merchants, which was part of the common law introduced into this country, in consequence of the practice in other countries. If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotiable there by the custom of merchants; and if so, what is the effect of the statute of Anne as to promissory notes? It expressly recites, that it was passed to the intent to encourage trade and commerce, which would be much advanced, if such notes should have the same effect as inland bills of exchange, and should be negotiated in like manner. The object clearly

(1) 1 B. & C. 192.

(2) 1 M. & M. 66.

(3) 6 Mod. 29.

(4) B. R. H. 39 Geo. III. ; Bayley on Bills, 5th ed., p. 26.

was, to make promissory notes negotiable like English bills. If, therefore, English bills of exchange were negotiable when abroad, these notes ought to be so likewise, in order to satisfy the intention of the Legislature; and I find nothing in the enacting part of the statute to restrain their negotiability to England. A note payable to bearer, therefore, is transferable abroad just as an English bill of exchange drawn in England, and remitted to a foreign country, would be. It may be true that great injury has been suffered of late by the facility enjoyed of sending stolen notes abroad; but, on the other hand, the negotiability of English notes in foreign countries is a great convenience, as it saves the necessity of carrying abroad specie. The judgment of the Court must be for the plaintiff.

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LITLEDALE, J. :

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The statute makes promissory notes transferable in the same manner as inland bills of exchange; and it seems to me, therefore, that it makes them transferable in a foreign country in the same manner as inland bills undoubtedly are by the custom of merchants. It follows that, since the statute, a note made in England, assignable by delivery, will pass as currency abroad as well as here.

PARKE, J. :

The question is, whether the plaintiff had the legal interest in this promissory note? and I have not the least doubt that he had by the express words of the statute of Anne. That statute enacts, that all notes in writing, whereby any person promises to pay to any other person or persons, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants. Here, therefore, whoever was the bearer of the note may sue, unless it be shewn that the note was not obtained *bonâ fide*, and for valuable consideration. It was so obtained here, and it comes, therefore, within the express words of the

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statute. A holder of an inland bill, indorsed to him in France, would undoubtedly be entitled to recover on it. If the effect of the statute were to make promissory notes transferable in England only, the circulation of such notes as this would be much impeded, for the property in a Bank note (remitted to a foreign country) would always remain in that person who was the last bearer in England; and \*it might be extremely difficult to say who he was. I think that this note was transferable in France by delivery; and it is very beneficial to the Bank that that should be so; for it is their interest that their notes should have the most extensive circulation.

PATTESON, J. :

The question between the parties is reduced to this, whether a note made in England can be transferred in a foreign country? There is no limitation in this respect by the statute of Anne, for notes are made transferable in the same manner as inland bills of exchange. And as an inland bill of exchange (remitted to a foreign country) would be negotiable by the custom of merchants, it follows that promissory notes are so by the statute.

*Judgment for the plaintiff.*

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1831.  
*May 7.*

[ 391 ]

## REX v. THE JUSTICES OF PEMBROKESHIRE.

(2 Barn. & Adol. 391—394; S. C. 1 L. J. (N. S.) M. C. 92.)

When the Sessions on determining an appeal have granted a case, but none has been stated, the Court will, under some circumstances, direct a *mandamus* to the justices who heard the appeal, to state a case.

But not where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the Court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case.

CAMPBELL had obtained a rule *nisi* for a *mandamus* to the justices of Pembrokeshire to state a special case for the opinion of this Court, pursuant to an order of Sessions made on hearing an appeal against an order of removal from Narberth to Llanboidy, and to return the case so stated into this Court. It appeared

[ \*392 ]

by the affidavits in support of the rule, that the appeal \*came on

to be tried at the Midsummer Quarter Sessions for Pembrokeshire, in 1830, when, after hearing contradictory evidence on behalf of the two parties on a question of settlement by renting a tenement, the Court confirmed the order; but, being requested to grant a case, did so in general terms, and without reference to any specific point. The attorneys could not agree in drawing up a case; and, upon their waiting on the chairman in order that he might settle the statements they had prepared, he said he could not sign any case by which it should not appear that the Court had decided in favour of the respondents on the facts, independent of the law. The appellants' attorney declined taking a case so stated.

*John Evans* now shewed cause; and it appeared by the affidavits against the rule, that the question of law which the appellants wished to bring before this Court regarded the effect of a supposed agreement between the pauper and the landlord of the tenement, that certain repairs to be done by the pauper (and which it was alleged he had afterwards done) should be allowed in lieu of rent: but it seemed that the justices at Sessions, although they granted the case, had been of opinion, upon the evidence, that the agreement had not been made, nor the repairs done; and the chairman would not sign any statement to a different effect.

LORD TENTERDEN, Ch. J.:

The justices have confirmed the order, subject to a case. That is no confirmation, unless a case be stated. All we can do, under the circumstances, is to require them to enter continuances, and hear the appeal. I do not see how we can order them to state a case.

The rest of the COURT concurred.

*Rule discharged.*

[ 393 ]

On a subsequent day in the Term, *Campbell* mentioned to the Court a case, *The King v. The Earl of Effingham* and others (determined in Hilary Term, 1782), of which he had obtained a note taken by the late Mr. Dealtry, and in which the Court

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granted a *mandamus* to the justices present at the last Bradford (West Riding of Yorkshire) Sessions, to state a case.

LORD TENTERDEN, Ch. J. :

I admit that there may be instances in which such a *mandamus* may issue ; but not that it ought to go upon the present application. Here the case, if stated, could come to nothing. The facts are for the judgment of the Sessions ; and, under the circumstances disclosed, it would evidently be useless to call upon them for a case (1).

(1) Thereporters have been favoured by Mr. Dealtry with a copy of the note above referred to, which is in substance as follows :

REX v. THE RIGHT HON. THE EARL OF EFFINGHAM AND OTHERS.

Michaelmas Term, 1781.

MOTION by *Mr. J. P. Heywood* for a *mandamus* to the Earl of Effingham, Henry Wickham, Esquire, Henry Wood, D.D., Henry Zouch, clerk, Pemberton Milnes, Esquire, Sir Watts Horton, Bart., and Joshua Horton, Esquire, justices, &c. for the West Riding of Yorkshire, commanding them to state a special case on an appeal between the inhabitants of Northowram and the inhabitants of Hipperholme, determined by them at Sessions, 13th of July last ; on affidavit that, the order being affirmed, the appellants desired a special case to be stated, which the Sessions unanimously consented to ; and *Mr. Heywood*, counsel for the appellants, drew the case ; and in the afternoon both counsel tendered the case to the Sessions for their approbation. *Mr. Wickham* and *Mr. Horton*, who joined in making the original order, and *Sir Watts Horton*, who had an estate in each parish, and therefore declined giving any opinion in the morning, were the only justices remaining, when *Sir W. H.* refused to permit the case to be stated ; and he being

joined by *Mr. Horton*, no case was stated.

Lord MANSFIELD doubted whether a *mandamus* could go to compel justices to state a case ; but *Mr. J. Buller* saying, that in this instance the Court of Quarter Sessions had actually agreed to state one, but *Sir W. H.* prevented it, a rule *nisi* was granted.

Hilary Term, 1782.

*Mr. Fearnley* and *Mr. Dunning* shewed cause, on affidavits, in which it was represented that the case had not been regularly granted, but that some of the justices had said a case might be stated if counsel could agree upon one ; that counsel had not agreed, and that no directions for a case had been given to the clerk of the peace. *The Attorney-General* and *Mr. Heywood* in reply, said, that the case had been properly granted, and that the justices were willing that it should be stated ; and the *Attorney-General* mentioned that an instance had occurred in which a *mandamus* had been granted, when the respondents would not consent to the stating of a case.

Lord MANSFIELD ordered the case annexed to the affidavits in support of the rule to be read ; and, it being read, asked *Mr. Fearnley* what facts

[ 394, n. ]

## HIGGINS v. SCOTT.

(2 Barn. &amp; Adol. 413—415; S. C. 9 L. J. K. B. 262.)

1831.  
May 9.  
[ 413 ]

The Statute of Limitations bars the remedy only, not the debt; and, therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages and costs; it was held, that the attorney (though he had taken no step in the cause, or to recover the amount of his bill of costs, within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods.

THIS was an action for an assault, commenced in the year 1822. One Hyatt was the attorney for the plaintiff. Final judgment was obtained in Michaelmas Term, 1823. There were no proceedings taken by Hyatt in the cause, or for the purpose of recovering the amount of his own bill of costs, after Easter Term, 1824, when the defendant was brought up under the Lords' Act, and remanded on the plaintiff's undertaking to pay the sixpences, but he failing therein, the defendant was afterwards discharged. In June, 1830, a *feri facias*, directed to the sheriff of Somersetshire, commanding him to levy the damages and costs, issued against the goods of the defendant, at the instance of the plaintiff, and the sheriff thereupon levied 114*l.* Hyatt obtained a rule *nisi* calling on the plaintiff or the sheriff of Somersetshire to pay over to him the money levied, on the ground, that he had \*a lien to a greater amount on the judgment for his bill of costs. On the rule coming on in Hilary Term, it was referred to the Master to ascertain whether Hyatt had any and what lien. The Master

[ \*414 ]

in the case he could controvert? *Mr. Fearnley* said he had not seen the case at the Sessions, and was not prepared now to go into the truth of the facts. *Mr. Heywood* observed, that though the case was annexed to *Mr. Parker's* affidavit, none of the justices shewing cause had denied any fact in it. Lord MANSFIELD said there had been a misunderstanding; there did not seem to be any contrariety of facts, and the *mandamus* must go. *Mr. Fearnley* asked whether the justices must re-examine the witnesses?

LORD MANSFIELD :

They must do it in order to know what case to return, if there is a difference about the facts.

In Easter Term, 1782, a return was made, stating a special case, and stating also that the Sessions had discharged the order of two justices; and *Mr. Heywood* obtained a rule *nisi* for affirming this last-mentioned order of Sessions; which rule was afterwards made absolute, no cause being shewn.

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reported that he had a lien to the extent of 92*l.* 10*s.*, unless the debt was barred by the Statute of Limitations. A rule *nisi* had been obtained for discharging the former rule, on the ground that the debt claimed by Hyatt was barred by the Statute of Limitations.

*Campbell* now shewed cause :

The Statute of Limitations bars the remedy, not the debt ; and, therefore, it was held by Lord ELDON in *Spears v. Hartly* (1), that although the statute has run against a demand, if a creditor obtain possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien.

*Follett*, *contra* :

The Master has reported in favour of the lien, in the event only of the debt not being barred by the Statute of Limitations. Now it is clear that if Hyatt had brought an action against the plaintiff for his bill of costs, the Statute of Limitations would have been an answer: *Rothery v. Munnings* (2) ; and if the remedy by action is gone, he has no right to enforce his claim by taking from the plaintiff the benefit of the execution now issued by the plaintiff himself against the defendant.

Per CURIAM :

[ \*415 ]

The Statute of Limitations bars the remedy, not the debt ; and it having been ascertained that Hyatt has a lien unless the debt be barred by the \*statute, it follows that he has a right to the satisfaction of his demand out of the sum now levied. The rule may, however, be made absolute on the sheriff's paying over to Hyatt the sum of 92*l.* 10*s.*

*Rule absolute on those terms.*

(1) 6 R. R. 814 (3 Esp. 81).

(2) 35 R. R. 202 (1 B. & Ad. 15).

## HELPS AND ANOTHER v. WINTERBOTTOM.

1831.

(2 Barn. &amp; Adol. 431—436; S. C. 9 L. J. K. B. 258.)

[ 431 ]

Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option: Held, PARKE, J. *dubitante*, that this was in effect a nine months' credit, and, consequently, that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the Statute of Limitations.

ASSUMPSIT for goods sold and delivered. Money counts. Plea, that the action did not accrue within six years. Replication, that the action did accrue, &c. and issue joined. At the trial before Park, J., at the Yorkshire Spring Assizes, 1830, a witness, named Kenworthy, proved that he had sold the goods (Spanish wool of the value of 33*l.*) to the defendant on behalf of the plaintiff, on the 20th of May, 1823; \*and it appeared from his evidence that the agreement between him and the defendant was for six months' credit, payment to be then made by a bill at two, or three, months at the purchaser's option; and that the parties had dealt upon these terms before. Nothing was said in the invoice as to the time of payment. The action was commenced on the 14th of January, 1830, and was therefore barred by the statute if the goods were to be considered as having been purchased at only six months' credit. The learned Judge, in leaving the case to the jury, said that the goods must be presumed to have been sold upon the terms of the former bargains, namely, six months' credit, and then payment by a bill at two or three. The jury found for the plaintiff. In the following Term a rule *nisi* was obtained for a new trial, on the ground that no delivery and acceptance of the goods had been proved; that, consequently, the terms of the bargain could only be proved by a note or memorandum in writing; and that the invoice, which was the only written memorandum, said nothing of the time of payment. In Hilary Term, 1831,

[ \*432 ]

*Wightman* shewed cause:

It is true that, by inadvertence, the delivery and acceptance were not proved; but this was not made a point at the trial, and the objection ought not to prevail now. Then Kenworthy's

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evidence afforded sufficient ground for the jury to presume that the contract was for six months' credit, and a bill afterwards at two months or three; and if so, the plaintiff might bring an action for goods sold and delivered at the expiration of the nine months, and the statute would not attach till six years had elapsed from that time.

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*Blackburne, contra :*

As no delivery was proved, either there is no evidence of a contract, to satisfy the Statute of Frauds, or the invoice is that evidence. But the invoice says nothing of the time of credit, and terms cannot be superadded to those contained in the written instrument. If they could, there was no sufficient proof of an agreement for six months' credit, and payment afterwards by a bill at two, or three, months, at the defendant's option. And if this had been the contract, the declaration ought to have been special, and not merely for goods sold and delivered.

LORD TENTERDEN, Ch. J. :

It does not appear that the learned counsel for the defendant was instructed to contend that there was no delivery. All parties seem to have taken it for granted that the goods had been delivered; and I think, therefore, it would not be doing justice to grant a new trial on account of the defect of proof in this particular. As to the terms of the contract, whether they were or were not for such credit as the plaintiff alleged, was a question for the jury, and might have been expressly left to them, if it had been desired on behalf of the defendant. Then, supposing the agreement to have been for six months' credit, and payment at the end of that time by a bill at two, or three, months, I think the action was properly brought. It is commenced in time, whether the term of credit be considered in the whole as eight or nine months; and it appears to me that no action could have been maintained for goods sold and delivered till the eight or the nine months had expired. The plaintiff might have brought an action after the end of the six months, for not giving a bill pursuant to the contract, but then he \*would not have recovered the whole price of the goods; he would only have been entitled to such damages as the jury might have thought reasonable for

[ \*434 ]

the breach of contract. It was, indeed, once doubted (by Lord ALVANLEY, Ch. J. in *Dutton v. Solomonson* (1)), whether an action for goods sold and delivered would lie upon the expiration of a contract of this kind, and whether the declaration ought not to be special; but it has been decided in other cases that the action for goods sold will lie; and I think that on a contract like the present, a declaration at the end of the eight or nine months stands upon the same footing with a declaration at the end of six months where the credit is for that time absolutely. In each case the action for goods sold would not lie before the expiration of the time; but it may properly be brought when the whole credit has elapsed.

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LITLEDALE, J.:

If the contract was for six months' credit, and then a bill to be given at two, or three, this action was in time. In *Dutton v. Solomonson*, and some other cases decided about the same period, it was much discussed whether upon this peculiar kind of contract an action for goods sold and delivered would lie at the end of the six months; and whether that was the proper form of action when the time had expired for which the bill was to be given. The result of the cases is, that at the end of the six months an action lies for not delivering a bill according to the contract, the party being then entitled, not to payment, but to a better security \*for his money. In a suit, however, for this cause of action, the plaintiff would probably not recover any thing approaching to the whole debt; and this is not the cause of action to which the Statute of Limitations would apply, upon a declaration for goods sold and delivered. It appears to me that such a declaration, after the end of the time for which the bill was to be given, is correct, and that the action, commenced within six years after the expiration of the two, or three, months, is not barred by the statute.

[ \*435 ]

PARKE, J.:

It is established now, that where, on a sale of goods, credit is given for a certain number of months, and payment to be made

(1) 7 B. R. 883 (3 Bos. & P. 582).

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afterwards by a bill at so many more, an action for goods sold and delivered will lie at the end of the whole time. It was doubted by Lord ALVANLEY, in the case which has been referred to, whether such an action did then lie, or whether the declaration should not be on the special agreement; but it was settled in *Brooke v. White* (1) that the general form of declaration was proper in such a case. But, in the present instance, I have some doubt whether the statute is not an answer, inasmuch as the agreement for giving a bill is optional in its form. The ground on which it has been held that *indebitatus assumpsit* lies at the expiration of a credit of the present description, has been, that the contract substantially is for so many months' credit, payment to be made at the end of that time, in cash, but security to be given for part of the time by the delivery of a bill at a certain stipulated period (2). But a difficulty arises where the security to be given is a \*bill at two, or three, months; for I do not see, in such a case, how it can be said that there was any certain credit (after the six months), at the expiration of which *indebitatus assumpsit* would lie for the value of the goods; the contract, as far as regards the bill, being for a time which is at the debtor's option. I should be rather disposed to say, here, that the real contract was to pay in a bill at the end of six months, and that if no bill was given at that time, the agreement was broken, and the credit was then at an end.

[ \*436 ]

PATTESON, J. :

I do not feel the difficulty which has been suggested on account of the option given with respect to the bill. It appears to me that the credit was, in effect, for nine months; that the Statute of Limitations would begin to run from the expiration of that time, and that before that period the present action could not have been maintained, though the plaintiff might have declared specially on the omission to give a bill at the end of six months. The rule must, therefore, be discharged.

*Rule discharged.*

(1) 1 Bos. & P. (N. R.) 330.

(2) *Mussen v. Price*, 4 East, 147.

LEWIS *v.* BRANTHWAITE(1).

(2 Barn. &amp; Adol. 437—445; S. C. 9 L. J. K. B. 263.)

1831.

[ 437 ]

In copyhold lands, although the property in mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface.

TRESPASS for breaking and entering a close of the plaintiff, called Twin-y-colledge, situate in the parish of Monythusloyne, in the county of Monmouth, and digging up and subverting the earth and soil of the said close, and driving, digging, and sinking levels, mines, shafts, and holes in, into, under, along, and through the said close of the plaintiff, and from and out of the said levels so driven, &c. digging and getting large quantities of earth, soil, and stones. At the trial before Bolland, B., at the Spring Assizes for the county of Monmouth, 1830, it appeared that the plaintiff was a copyhold tenant of the manor of Abercarne, in the county of Monmouth, of, *inter alia*, the Twin-y-colledge; and that the defendant being in possession of a colliery lying under land adjoining that of the plaintiff, opened a level under Twin-y-colledge, and took coal therefrom. It was contended, that as there was no evidence that the defendant had ever trespassed on the surface, the plaintiff, a copyhold tenant, could not maintain an action for a trespass to the subsoil, he being in possession of the surface only, and the mines and trees being in the lord. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

*Russell*, Serjt. and *Blewitt*, in Hilary Term, shewed cause :

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If the position contended for on the part of the defendant were correct, the lord might, by opening a pit in some part of his own demesnes or in the waste, work out the mines in the manor, without trespassing on the copyholder. The lord has no possessory, but a reversionary interest only, as the owner of the freehold

(1) The principle of this case is *Earl Granville* (1876) 3 Ch. D. 826, explained and applied in *Eardley v.* 45 L. J. Ch. 669.—R. C.

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and inheritance; and the copyholder is in possession of both mines and trees; for, as the claim of the lord to both rests upon the same grounds, what is true with respect to the one is, in general, true with respect to the other. A copyhold was, in its origin, a tenancy at will only. A tenant at will, however, has a possession of every thing; for a grant of land passes every thing under it; and a demise of land passes the same possessory interest in every thing comprehended in that term, whether the demise be at will, for years, or for life. It is true that the lessor of a tenant at will may maintain trespass against him if he cut down the trees; because the wrongful act of the lessee in taking upon himself to cut timber concerns so much the freehold and inheritance, that it amounts in law to a determination of the will: 1 Roll. Abr. 860; 2 Roll. Abr. 555; Co. Litt. 57 a. Hence it is clear, nevertheless, that the possession of the trees, before the determination of the will, was in the tenant. The will may be determined by any act of the lessor which disturbs the possession, and which would be wrongful, except as a determination of the will; as, if the lessor, without consent of the lessee, enters and cuts down the trees demised: Co. Litt. 55 b. This also implies, that before the determination of the will the tenant is in possession of the trees. It is said, \*also, that if a stranger cut trees, the tenant at will shall have trespass: Hale's MSS., cited Co. Litt. 57 b, note 378. That the tenant at will has the same possession as tenant for years or for life is also clear for this reason, that tenant at will may take a release of the inheritance, and thereby his estate is enlarged: Com. Dig. Estates, (H. 3); or a confirmation for his life, upon which a remainder may be dependent (1).

[ \*439 ]

That lessees for years and for life are in possession of the subsoil cannot be questioned; first, because they may work mines open at the time of the demise, though the word mines should not be named therein: *Clavering v. Clavering* (2), *Astry v. Ballard* (3), *Stoughton v. Leigh* (4). Secondly, because the tenant of the particular estate must be in possession of every thing

(1) 3 Leon. 15.

(2) 2 P. Wms. 388.

(3) 2 Mod. 193.

(4) 11 R. R. 810 (1 Taunt. 402).

And see *Saunders's case*, 5 Co. Rep. 12 b.

which subsequently passes to the remainder-man. As livery of seisin cannot be made to him in remainder without infringing the possession of the lessee, the law allows livery made to the tenant of the particular estate to enure to him in remainder; but livery enures only in respect of the supposed actual possession of the lessee. Nothing, therefore, can pass to the remainder-man but that which is in possession of the lessee; and as the whole estate does pass to the remainder-man, it follows, of course, that the tenant of the particular estate is in possession of the whole.

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That the tenant cannot cut timber or open mines, arises, not from any exception or reservation out of the grant, but because the possession is given to him for a limited time only, after which the thing demised goes to another, who is entitled to have it in the same state as it was at the time of the grant. The lessee, therefore, cannot diminish in quantity or alter in its nature the thing demised, by cutting trees, digging for mines, or changing arable into pasture, or *vice versâ*. The only remedy, however, which the remainder-man has against the tenant, further shews the possession of the lessee, viz. an action of waste. For it was held in *Goodright v. Vivian* (1), after consideration of the authorities, that waste lies not where the place in which, &c. is no part of the demise.

[ \*440 ]

Then, as a tenant at will has the same possession as a tenant for years or for life, and as they are in possession of the whole, it follows that the copyholder is also in possession of the whole. For a copyhold, though originally a tenancy at will, is now something more; and whatever is true of a tenancy at will, in respect of possession, must be true also of a copyhold. Copyholds are to be governed by the rules of the common law, unless a particular custom intervenes: *Fisher v. Wiggs* (2). And in *Heydon and Smith's* case (3), FOSTER, J. said, "Without a custom, the lord cannot fell the trees growing on the copyhold any more than upon a lease for years;" and it was held there, that a copyholder might maintain trespass for cutting trees growing on his copyhold, even against the lord. The lord and the copyholder, therefore, are in the same respective situations with regard to the possession of mines and trees as the remainder-man and the tenant for years.

(1) 8 East, 190.

(2) 12 Mod. 301.

(3) Godb. 172.

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[ \*441 ]

The only ground upon which the position on the other side could be supported is a supposed reservation \*or exception out of the grant. That there is no express exception is clear, and in the absence of custom, upon what principle can such an exception be implied? From the cases of *Bourne v. Taylor* (1), and *Whitechurch v. Holworthy* (2), it is clear that no such implied exception or reservation exists; for if there were an exception, there would be a power to enter upon the copyhold and open mines. But in *Bourne v. Taylor* it was held, that the lord cannot, without a custom, enter on the copyhold to bore and dig for mines; and in *Whitechurch v. Holworthy*, that he cannot, without a custom, enter to cut trees. It follows, therefore, of course, that the lord, merely as such, could not claim the benefit of an implied reservation.

*Campbell, contra :*

[ \*442 ]

There is no express authority to shew that a copyholder may maintain an action for a trespass committed in the subsoil. It may be conceded that a tenant at will has the same possession as a tenant for life or for years, and may therefore have a release of the inheritance or a confirmation for his life. There is a distinction, however, between a freehold and a copyhold interest. In copyholds the interest in the soil belongs to the lord; the tenants of the manor hold at will, according to the custom of the manor. The interest of the copyhold tenant is analogous to that of a person holding under a lease, in which there is a reservation of minerals; and it is clear that the landlord may demise to a tenant, reserving to himself minerals, without a right of breaking the soil. So the lord, when he originally granted the surface to a copyhold tenant, may be considered as having retained in \*himself the freehold in the soil. *Bourne v. Taylor* only shews that the lord of a manor has no right to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same, and that the copyholder may maintain trespass against him for so doing. There the lord entered on the surface of the land. Here the defendant took the coal from the subsoil, and committed no trespass on the surface.

(1) 10 R. R. 267 (10 East, 189).

(2) 16 R. R. 481 (4 M. & S. 340).

It was observed by the LORD CHIEF JUSTICE in *Rowe v. Brenton* (1), that in many manors the lord is entitled to minerals, though he has no right to come upon the land to take them. The lord may have demised the upper stratum of the soil, but not certain strata below; and if so, they are not in the tenant's possession, and trespass must lie at the suit of the lord for breaking and entering into the mines within them.

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(LORD TENTERDEN, Ch. J.: Trover is the form of action most generally adopted.)

There the plaintiff could only recover the mercantile value of the minerals taken. *Whitechurch v. Holworthy* (2) is the authority which presses most strongly against the defendant. There it was decided, that the lord of a manor has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there be no custom in the manor. But trees differ in this respect from minerals. The tenant has an interest in the growing trees, in lop and crop and shade, house-bote and plough-bote, but he has no interest in minerals. There is no decision or *dictum* to shew that, in the case of copyhold, the possession of them is in the tenant.

LORD TENTERDEN, Ch. J.:

[ 443 ]

I am of opinion that trespass is maintainable. It is well established that property may be in one person and possession in another. Although, therefore, the property in a mine be in the lord, it does not follow that possession of it may not be in the copyholder. The property in trees is in the lord, yet the possession of them is in the tenant; and the latter may maintain trespass even against the lord for cutting down trees. Unless, therefore, there be a distinction between trees on the surface of the soil and minerals below, the authorities cited as to trees are in point. No decision or *dictum* has been cited which warrants any such distinction. The general rule being that he who has the surface has the subsoil, it seems to me that the copyholder has possession of the subsoil, though he may have no property in it.

(1) 32 R. R. 524 (8 B. & C. 737). (2) 16 R. R. 481 (4 M. & S. 340).

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The authorities cited to shew that a lessee at will may take a release of the inheritance whereby his estate is enlarged, or a confirmation for his life upon which a remainder may be dependent, are in favour of this opinion. As, then, the possession of a mine is in the copyholder, and not in the lord, the former may maintain trespass for an entry upon it. The rule for entering a nonsuit must be discharged.

LITLEDALE, J. :

[ \*444 ]

I am of the same opinion. It is not disputed that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth ; but it is said that there is a distinction in this respect between a copyholder who is the tenant at will of the lord and a tenant of a freeholder ; that as the absolute property in \*the freehold is in the lord, the property in the mine must be in him ; and that as the plaintiff could not make use of these minerals, he cannot maintain an action against a wrongdoer for committing a trespass in the soil below the surface. But if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the subsoil belonged to him. I am of opinion that although the property in the mine may be in the lord, he has not such a possessory right in it as to entitle him to maintain trespass against a wrongdoer ; and that the copyhold tenant has such a possessory right ; and may recover substantial damages for any actual injury done to the surface, and nominal damages for a trespass committed below the surface. The authorities as to trees are in point. In Com. Dig. tit. Copyhold, (K) 7, it is said, “ And if the lord cut down trees where by custom the copyholder shall have the lops, an action on the case lies against the lord ; ” and 1 Roll. Abr. 108, is cited. And afterwards, “ So if a stranger cut down trees upon a copyhold, the copyholder shall have an action upon the case for the loss of shade, fruit, &c., though it was not the custom for him to take the trees,” to which point *Jefferson v. Jefferson* (1) is cited. And it is further said that the copyholder in such a case may have trespass. It seems to me that the possession of the soil is in the

(1) 3 Lev. 131.

copyholder from the surface down to the centre of the earth. Here it appears that the defendant came into the plaintiff's sub-soil by breaking through from a shaft below the surface. That being so, I think trespass is maintainable.

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TAUNTON, J. having been counsel in the cause gave no opinion.

[ 445 ]

PATTESON, J. :

There is no distinction between a tenant holding under a freeholder, and a copyholder holding at the will of the lord, according to the custom of the manor, as far as possession of the property is concerned. Although the copyholder may have no right to make use of the minerals, he has a sufficient possession to entitle him to maintain trespass against a wrongdoer.

*Rule discharged.*

# MARTHA RICHARDS v. WILLIAM RICHARDS (1).

(2 Barn. & Adol. 447—456; S. C. 9 L. J. K. B. 319.)

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June 11.

[ 447 ]

A married woman being administratrix received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest: Held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note.

THIS was an action on a promissory note, dated the 20th of November, 1817, for payment to Martha Richards of 300*l.*, with lawful interest, for value received. The defendant pleaded, first, the general issue; secondly, the Statute of Limitations. The cause was tried before Bosanquet, J. at the Somerset Spring Assizes, 1830. It appeared that the note was the joint and several note of Thomas Richards, senior, William Richards, and

(1) Followed in *Fleet v. Perrins* (Ex. Ch. 1869) L. R. 4 Q. B. 500, 38 L. J. Q. B. 257. Of course the question could only have arisen in regard

to the property of a wife married before 1st January, 1883, when the Married Women's Property Act, 1882, came into operation.—R. C.

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Thomas Richards. Martha Richards, the payee of the note, and present plaintiff, was, at the time when the note was made, the wife, and, when the action \*was brought, the widow, of Thomas Richards, senior, one of the makers of the note; he died on the 11th of July, 1827. The sum for which the note was given was money which belonged to the plaintiff as administratrix of Samuel Reynold, her first husband, and arose from the paying off some securities given to Reynold, and which securities were discharged and the money paid, in the lifetime of Thomas Richards, the second husband. The jury found a verdict for the plaintiff for the principal money and interest from the date of the note. In Easter Term, 1830, a rule *nisi* was obtained to enter a nonsuit or reduce the damages to 300*l*.

*R. Bayly* in Easter Term shewed cause :

The promissory note was a chose in action; and not having been reduced into possession by the husband, it survived to the wife. She, therefore, may now maintain an action on it. The Statute of Limitations is no answer, because the plaintiff having been a *feme covert* at the time the note was given, no right of action accrued to her till the death of her husband, and she commenced her suit within six years after that event. She is entitled to recover interest from the date of the note by the express terms of the contract between the parties.

*Erle* and *Follett*, *contrà* :

[ \*449 ]

First, the note is altogether void; and, secondly, if it be valid, the Statute of Limitations is a bar to this action. First, the note was void in the first instance. No action could be maintained on it, as the husband of the present plaintiff must have joined with her as a plaintiff, and he must have been at the same time either a defendant or liable to the other defendants, his sureties, for contribution, if the action \*had been brought against them alone. No action can be maintained where the same person is a co-plaintiff and co-defendant, or a co-plaintiff and liable to the defendant for contribution: *Teague v. Hubbard* (1), *Sparrow v. Chisman* (2). In the latter case one of the plaintiffs undertook to

(1) 8 B. & C. 345.

(2) 32 R. R. 664 (9 B. & C. 241).

the defendant to provide for the note at maturity; he was therefore bound to indemnify the defendant, and it was held, consequently, that the plaintiffs could not sue. If the note was originally such that no action was maintainable on it, no subsequent change of circumstances could create a right of action on it. Besides, if a personal action is suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged. Thus if an obligor is made executor to an obligee, and administers some of the goods, but does not prove the will, and dies, the debt is extinguished: *Wankford v. Wankford* (1). So if a feme obligee marries an obligor it is an extinguishment; it is a release in law of the debt, for it is the act of the obligee herself, *Sir John Needham's case* (2). Also where the contract is joint and several, and the right of action is suspended, and gone, as to one of the joint contractors, it is the same as if it had been a joint cause of action only, and it is discharged as to all the contractors: *Cheetham v. Ward* (3). Here it was the voluntary act of the wife to take a security from her husband; and as during coverture the right of action was thereby suspended, it was for ever extinguished. The note is also void, because it is payable on a contingency only, and not at all \*events. If the husband had survived the wife payment could never have been enforced. The time of payment was uncertain, and might or might not ever happen: *Colehan v. Cooke* (4). Further, the plaintiff cannot maintain her action, because the note is in the nature of a chattel; it therefore belongs to the executors of the husband, and does not survive to the wife. In *M'Neilage v. Holloway* (5) it was held that a bill of exchange payable to a *feme sole*, who married before the same was due, was in the nature of a personal chattel, and that the husband might sue in his own name without joining his wife, although the latter had not indorsed the bill. *Philliskirk v. Pluckwell* (6) shews that husband and wife may sue on a promissory note made to the wife during coverture.

But, assuming the note to be valid, the right of action is barred by the Statute of Limitations. Where several have a right of

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[ \*450 ]

(1) 1 Salk. 299.

(2) 8 Co. Rep. 268.

(3) 4 R. R. 741 (1 Bos. & P. 630),  
and the Year Books, 21 Edw. IV. 81 b,

and 21 Hen. VII. 29 b, there cited.

(4) Willes, 393.

(5) 1 B. & Ald. 218.

(6) 2 M. & S. 393.

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action, and some are under a disability, but the statute begins to run against one, it operates as a bar to all: *Perry v. Jackson* (1). Here the statute began to run against the husband; it therefore is a bar to the right of the present plaintiff. At all events interest cannot be recovered for the time that ran during the lifetime of the husband; for as no action on the note could have been maintained during his lifetime, there was during that time no forbearance of the principal money. Besides, as there was no one *in esse* entitled to enforce payment, no interest would accrue: *Murray v. The East India Company* (2).

*Cur. adv. vult.*

[ 451 ] LORD TENTERDEN, Ch. J. in the course of this Term delivered the judgment of the COURT (3):

After stating the facts of the case, he proceeded as follows: The money for which the note was given was lent by Martha Richards, either to her husband, by that means rendering the other two makers of the note sureties for him, or else it was lent to the three makers jointly, or else to one of the other two makers, by that means rendering the husband and the other maker sureties. But for the purposes of the present enquiry, it may be taken to have been lent to the husband, which is the least favourable state of circumstances for the plaintiff's right of action. The case was argued last Term, and, upon a consideration of it, we are of opinion that the verdict should stand both for the principal and interest.

We consider that the money was lent to the plaintiff's husband, and that the other makers of the note were sureties for him, which, as I before stated, is the most unfavourable state of circumstances for the plaintiff's right to recover. We entirely concur in one of the arguments urged for the defendant, that, at the time when the note was given, no action could be brought upon it; none could be brought against the husband, because he must have joined the wife as plaintiff, and then he would be both plaintiff and defendant, and none could be brought against the

(1) 2 R. R. 452 (4 T. R. 516).

(2) 24 R. R. 325 (5 B. & Ald. 204).

(3) The case was argued before

Lord Tenterden, Ch. J., Littledale, Parke, and Patteson, JJ.

other makers, because they being sureties for the husband, if he and his wife had recovered against them, they would have had an action against him to recover the money which they had so paid.

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But upon the death of the husband a new state of things arose, and the question is, how that affects the plaintiff's rights. The defendant contends, that as the note in the first instance was such a one as could not be sued upon at law, it always continued so, and that no change of circumstances could create a right of action, when none existed originally. But we think that conclusion does not follow. The note was not void; it was a good note in form, and there was a good consideration for it; it was a meritorious security, though the forms of legal proceedings would not allow an action to be brought upon it.

[ 452 ]

The objections to proceeding at law are merely of a technical nature, and they only apply to the mode of enforcing the security; and if these technical objections cease to exist, there seems no reason why the remedy on the note should not be put on the same footing as if no such objection had existed when the note was given. And that being so, it is to be considered whether the plaintiff's right to recover be affected by any other circumstances in the case.

The general rule of law is, that choses in action, which are given to the wife either before or after her marriage, survive to her after the death of her husband, provided he has not reduced them into possession.

It is material to consider, whether the note be a personal chattel or be a chose in action; if it be a personal chattel, then it belongs to the husband, and the property in it would vest in the husband, and on his death would go to his executors, even though he died in the lifetime of his wife. The case of *M'Neillage v. Holloway* (1) has been cited to shew that this note is a personal chattel, and that the property became vested in the husband; but without considering whether the observations made in that case are correct, we think the present differs from it in this respect, that there the instrument existed before the marriage, and the husband brought the action in the lifetime of the wife;

[ \*453 ]

(1) 1 B. & Ald. 218.

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and the question was, what effect the marriage had upon it? but here the note was given by the husband himself to the wife after the marriage, and the wife survived the husband; and to hold that to be a personal chattel vesting absolutely in the husband would be to make the note a nullity at the time of its creation. And we are of opinion that, as a promissory note in the ordinary course of things is a chose in action, there is nothing in this case to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession. In Co. Litt. 351 b, it is said “the marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods *en autre droit* as executrix or administratrix, &c. the marriage is no gift of them to the husband although he survive his wife.” In *Garforth v. Bradley* (1) Lord HARDWICKE says, that where a chose in action comes to the wife, whether vesting before or after marriage, if the husband die in the lifetime of the wife, it will survive to the wife, with \*this distinction, that as to those which come during the coverture, the husband may, for them, bring an action in his own name, and may disagree to the interest of the wife, and that recovery in his own name is equal to reducing into possession. Some cases are mentioned by Lord HARDWICKE to prove what he states, and many others might be added to that effect. The same doctrine, as to survivorship, was held by this Court in the course of last Term, in a cause of *Betts, Administrator, v. Kimpton* (2). And there is no doubt but that if security such as a bond or note be given to a woman during coverture, the husband may, if he pleases, reduce it into possession, and make it his own.

In the present case, the husband in point of fact has done nothing to make the note his own, or to reduce it into possession, and it is very questionable whether in point of law he could if he had wished; but that need not be considered.

Then if the property in the note vested in the wife on the death of her husband, the parties to the note then living were Martha,

(1) 2 Ves. Sen. 675.

(2) 2 B. & Ad. 273.

the plaintiff, the payee of the note, and William Richards, and Thomas Richards the younger, the two surviving makers of the note: there was, therefore, no technical objection then remaining to her bringing an action at law upon it. And there is no objection on the merits, because she is beneficially interested in it, and the surviving makers have given their security for its payment.

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It has been said that the note cannot be enforced, because it is payable on a contingency. We do not think that it can be so considered. Upon the face of \*it there is no contingency; the contingency is only as to the persons who may have a right to enforce it under particular circumstances. If the husband die in the lifetime of the wife, then the right to sue vests in the wife: if, on the other hand, the wife die first, then the note vests in the administrator of the wife, but that does not create such a contingency as to make the instrument void as a note. The cases of contingency were much considered in the case of *Colehan v. Cooke*(1), which was referred to in the argument; but there is nothing in that case to bring us to the conclusion that it is void as being payable on a contingency.

[ \*455 ]

As to the Statute of Limitations: the plaintiff being a married woman is within the protection of the stat. 21 James I., and she had six years after the death of her husband to bring the action. The statute would have run against the husband, but upon his death an action accrued to her in her own right; and the rather, because in her husband's lifetime no action at law could have been brought upon it.

Then as to the amount of the interest. We think it may be recovered from the date; the note professes to be payable with interest; the person to whom the money was lent has had the benefit of it during the whole time; the husband was not entitled to the benefit of the interest in his lifetime, and the estate to which the plaintiff was administratrix has been kept out of the money since it was lent.

Upon the whole of the case we think that the rule \*should be discharged, both as relates to the new trial and also as to the reduction of the damages.

[ \*456 ]

*Rule discharged.*

(1) Willes, 393.

1831.  
June 11.

## STREET v. BLAY (1).

(2 Barn. &amp; Adol. 456—464.)

[ 456 ]

A person who has purchased a horse warranted sound, sold it again, and then repurchased it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he, by reason of the unsoundness, resist an action by that vendor for the price. But he may give the breach of warranty in evidence in reduction of damages.

*Semle*, that the purchaser of a specific chattel under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorizing the return, or consent of the vendor.

But where the contract is executory only when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose, the purchaser may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as by selling them.

ASSUMPSIT for a horse sold and delivered. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the sittings in London after Trinity Term, 1830, the following facts were proved. The defendant, a horse-dealer, bought the horse of the plaintiff, warranted sound, at 49*l.*, on the 2nd of February, 1830, and on the same day sold him to a customer, Mr. Bailey, for 45*l.* This purchaser, after having the horse in his possession a day, parted with him in exchange to another person, who also kept him a day, and then sold him again to the defendant for 30*l.* It did not appear that there was any warranty, except on the first sale. On the 9th of February the defendant sent the horse back to the plaintiff's premises, alleging that he was unsound, and had been so at the time of the purchase on the 2nd, and requiring the plaintiff to receive him again. The horse, when so returned, was lame. The plaintiff insisted that he was not bound to take the horse back, and brought this action to recover the purchase-money, which the defendant had never paid.

[ \*457 ] Lord TENTERDEN told the \*jury, if they were of opinion that

(1) Followed in *Gompertz v. Denton* (1832) 1 Cr. & Mee. 207; *Kennedy v. Panama Mail Co.* (1867) L. R. 2 Q. B. 580, 36 L. J. Q. B. 260. Cited and distinguished by BOVILL, Ch. J.

in *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438, 451, 41 L. J. C. P. 228, 235. And see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53.—R. C.

the horse was sound at the time of the first-mentioned sale, to find for the plaintiff, otherwise for the defendant; and in case of their finding for the defendant, he reserved for the opinion of this Court the question whether or not the defendant, after having sold the horse, could, upon becoming possessed of him again, return him to the plaintiff, and refuse payment of the price by reason of the original unsoundness? The jury found for the defendant. A rule was obtained in the next Term, calling on the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for 43*l*. In the following Easter Term

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*John Williams* shewed cause (1):

The ground of defence at the trial was, that the horse was unsound when sold to the defendant, and, consequently, that he was entitled to rescind the contract; to which it was answered that he had lost that right by disposing of the horse as his own to another purchaser. But this makes no alteration of rights as between the defendant and the plaintiff. On the 9th of February, when the defendant required that the horse should be taken back, there was nothing to prevent him from recurring to his bargain with the plaintiff, and the remedies upon it: he returned the horse, and did so upon grounds which, according to that bargain, the plaintiff could not resist; the intermediate transactions furnished no answer; the plaintiff was bound in the first instance to deliver a sound horse, and the question was, whether he had done so or not?

(PARKE, J.: According to the general rules on the subject of warranty, a vendee is bound to \*return the article as soon as he discovers the unsoundness; and he ought not, by letting it out of his hands, to delay the return.)

[ \*458 ]

If the horse had continued out of the defendant's possession, so that he could not return him, the unsoundness, when discovered, would still have been a ground for reducing the plaintiff's demand, or, if the price had been paid, for recovering back such portion

(1) Before Lord Tenterden, Ch. J., Littledale, Parke, and Patteson, JJ.

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of it as exceeded the real value of the horse. But here it so happens, that at the time when the question arises between the plaintiff and defendant, the horse is in the defendant's hands, so that he has the power of returning him. The dealings of the defendant with other parties, and any profit which he may have made by them, cannot alter the question, whether or not the plaintiff fulfilled his own contract with the defendant. The jury have found that he did not, and there is no reason for disturbing the verdict.

*The Attorney-General and Erle, contra :*

The defendant could not resist this action unless he would have been entitled, under the same circumstances, to sue the plaintiff for a breach of warranty. A defence of this kind is in the nature of a cross action upon the warranty, and is admitted in order to avoid circuitry of proceedings. If, therefore, the facts be such that the defendant, if he had sued on the warranty, could not have made out a claim to indemnity, neither is he entitled to allege, against the present demand, that the article furnished to him was not such as it was represented to be. Now, in the action on a warranty, the plaintiff is entitled to such damages as will indemnify him for his loss by the difference in value [ \*459 ] between the \*thing bargained for and that actually delivered. *Towers v. Barrett* (1) (by BULLER, J.), *Fielder v. Starkin* (2), and by Lord ELLENBOROUGH in *Payne v. Whale* (3); and here no loss had been suffered; on the contrary, the defendant has gained by the transaction. He could not, therefore, have recovered for the breach of warranty, nor can he make it a defence to this action.

(PARKE, J. : As there was a breach of contract, he would have been entitled to nominal damages, though it happened that by subsequent circumstances he did not sustain the damage that might naturally have been expected from the plaintiff's default.)

The attempt to return the horse could not avail the defendant as a rescinding of the contract. To claim that right, a purchaser

(1) 1 T. R. 133.

(3) 7 East, 274.

(2) 2 B. R. 700 (1 H. Bl. 17).

ought only to have used the article so far as was necessary to give it a fair trial: *Okell v. Smith* (1). In *Parker v. Palmer* (2) it was held, that the vendee, having put the commodity up for sale (though he bought it in again), could not, after assuming such dominion over the goods, return them to the vendor on the ground that they did not answer to the samples. Here the defendant actually parted with the horse. If a contract is to be rescinded, all parties must be placed *in statu quo*: *Hunt v. Silk* (3). It is impossible here to say that the plaintiff was restored to that situation. The horse had passed through several hands, in which various liabilities may have attached to it by bankruptcy or other means, which would affect the title of a party into whose possession it afterwards came. It is too late for the defendant to revert to his right against the plaintiff under the original contract: he is now possessed of the horse by a new purchase \*from a different party, and he cannot avail himself of that possession to rescind the former bargain.

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[ \*460 ]

*Cur. adv. vult.*

In the present Term Lord TENTERDEN, Ch. J. delivered the judgment of the COURT:

We have taken time to consider of this case, and are now of opinion that the rule ought to be made absolute for a new trial, unless the parties can agree to enter a verdict for the plaintiff for a sum less than the full amount.

The facts of the case were these: The plaintiff, on the 2nd of February, sold the horse to the defendant for 49*l.*, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey for 45*l.* Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterwards, sold it to the defendant for 30*l.* No warranty appeared to have been given on any of the three last sales. The horse was, in fact, unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The question for consideration is, whether the defendant, under these circumstances,

(1) 18 R. R. 752 (1 Stark. 107).

(3) 7 R. R. 739 (5 East, 449).

(2) 23 R. R. 313 (4 B. & Ald. 387).

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had a right to return the horse, and thereby exonerate himself from the payment of the whole price?

[ \*461 ]

It is not necessary to decide, whether in any case the purchaser of a specific chattel, who, having had an opportunity of exercising his judgment upon it, has bought it, with a warranty that it is of any particular quality or description, and actually accepted and received it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will \*only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. Lord ELDON, in the case of *Curtis v. Hannay* (1), is reported to have said, that “he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;” and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr. Starkie’s excellent work on the Law of Evidence, part iv. p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is,

[ \*462 ]

however, extremely difficult, indeed impossible, to \*reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and

(1) 3 Esp. 83.

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the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. *Weston v. Downes* (1), *Towers v. Barrett* (2), *Payne v. Whale* (3), *Power v. Wells* (4), and *Emanuel v. Dane* (5), where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuitry of action: *Cormack v. Gillis* (6), *King v. Boston* (7); and there is \*no hardship

[ \*463 ]

in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never

(1) 1 Doug. 23.

(2) 1 T. R. 133.

(3) 7 East, 274.

(4) Doug. 24, n.

(5) 3 Camp. 299.

(6) 7 East, 480.

(7) 7 East, 481, n.

STREET  
v.  
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completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial: *Okell v. Smith* (1); nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

[ \*464 ]

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to shew that he may return it where \*the purchaser has done more than was consistent with the purpose of trial; where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit.

These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the

(1) 18 R. R. 752 (1 Stark. 107).

parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum.

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*Rule absolute on the above terms.*

DOE D. JOHN ROGERS AND MARY ROGERS, HIS  
WIFE, v. JOHN CADWALLADER.

(2 Barn. & Adol. 473—478.)

1831.  
May 26.  
[ 473 ]

In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when the interest was paid, and consequently is no defence to the ejectment.

THIS was an ejectment to recover land in the county of Salop. The demise was laid on the 1st of July, 1830. At the trial before Patteson, J., at the Spring Assizes for the county of Salop, 1831, it appeared that Mary Rogers, before her inter-marriage with John Rogers, the other lessor of the plaintiff, became the mortgagee of the premises in question by virtue of a deed bearing date the 7th of May, 1828, and that the interest was payable on the 25th of December in every year. On the part of the defendant (who was tenant to the mortgagor) it was proved, that on the 15th of January, 1831, John Rogers had admitted that he and his wife had been paid all the interest up to the 25th of December, 1830. It was therefore contended on the part of the defendant that the action was not maintainable, because it was not competent to a mortgagee to treat the mortgagor or his tenants as trespassers at any time during which their lawful possession had been recognized, and that the mortgagee having received the interest on the mortgage money to the 25th of December, 1830, had thereby acknowledged that, to that time the defendant, the tenant of the mortgagor, was in lawful possession of the premises, and *Doe dem. Whitaker v. Hales* (1), decided in the Common Pleas in \*Hilary Term, 1831, (but not then in print,) was cited as an authority to shew that the receipt of interest was a recognition by the mortgagee, that

[ \*474 ]

(1) 33 R. R. 483 (7 Bing. 322).

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the mortgagor or his tenant was in lawful possession of the premises, and therefore an answer to the ejectment. The learned Judge, on the authority of that case, nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict in his favour.

*Talfourd*, in Easter Term, moved for a rule *nisi* pursuant to the leave given, on the ground that the payment of interest had no effect on the legal title to the land, which in ejectment must of necessity prevail. The mortgagee had two securities for his money, a possessory title to the land, and a personal covenant for the payment of the principal and interest, and he might enforce his remedies on either, or both, subject to his liability to account in equity. Even payment of the principal, unless a surrender of the term could be presumed, could be no defence at law to an ejectment, and much less could the payment of interest have this operation. The Court of Common Pleas has, in several instances, shewn a disposition to relax the strict rules of law affecting the relations of mortgagor and mortgagee, which has not received the sanction of this Court. But even the case of *Doe v. Hales* (1), relied on at the trial, did not go so far as was necessary to sustain the verdict, as that was not a mere case of payment of interest, but of the receipt of a portion of rent after a threat of distress, which might possibly be held to imply an assent to a tenancy.

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*Russell*, Serjt. now shewed cause :

The defendant was not a trespasser on the 1st of July, 1890. The interest due at Christmas, 1890, had then been paid. This state of facts, admitted by the mortgagee in January, 1891, was a recognition by him of a lawful and authorized possession by the mortgagor, and those who represented him, in the preceding July. It is undoubtedly true, that a mortgagee may maintain ejectment against the mortgagor without a notice to quit or a demand of possession: *Doe v. Maiscy* (2), *Doe v. Giles* (3). But in those cases there was no payment of interest or recognized possession. It is unnecessary to contend that receipt of interest

(1) 33 R. R. 483 (7 Bing. 322).

(3) 30 R. R. 686 (5 Bing. 421).

(2) 32 R. R. 548 (8 B. & C. 767).

creates a tenancy. It is sufficient to say that it sanctions the state of things as between the parties during the time for which the interest is received. Suppose a mortgagee to receive his interest regularly for six years, and then to bring his ejectment, laying the demise six years back, is the mortgagor to be treated as a trespasser for the six years, and liable to an action for six years' mesne profits? So long as a party is in possession of the premises with the privity and consent of the owner, he cannot be treated as a trespasser. Suppose the mortgagor be allowed to remain in possession, paying the interest as the bailiff or agent of the mortgagee only, still he would not, as a person in possession of a farm as the recognized bailiff or agent of the owner, be liable to be treated as a trespasser by action of ejectment. It cannot then be less than a permissive occupation. The mortgagee entitled to possession, instead of taking it, chooses to receive the \*interest and permit the mortgagor to occupy, and a permitted occupation will be a defence to an ejectment; as in *Doe dem. Foley v. Wilson* (1) where an enclosure from the waste was seen from time to time by the lord's steward; *Right dem. Lewis v. Beard* (2), and *Doe dem. Newby v. Jackson* (3), where the party was let into possession pending a treaty for a purchase. The decision in *Doe dem. Whitaker v. Hales* (4) proceeded on this principle, that there could not be a trespass where there was a permitted and recognized occupation. In a note to *Partridge v. Bere* (5) several cases are collected, tending to shew that payment of interest is evidence of an agreement between mortgagee and mortgagor, that the latter shall hold the land as tenant at will.

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LADER.

[ \*476 ]

LORD TENTERDEN, Ch. J. :

I think this case is not governed by that of *Doe dem. Whitaker v. Hales*. There the defendant, in order to shew that he was not a trespasser on the 25th of December, 1829, proved that in April, 1830, he was in possession of the premises, and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff,

(1) 11 East, 56.

(2) 13 East, 210.

(3) 1 B. & C. 448.

(4) 33 R. R. 483 (7 Bing. 322).

(5) 24 R. R. 487 (5 B. & Ald. 604).

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[ \*477 ]

and received money *eo nomine* as interest, the defendant being required to pay it instead of rent to the mortgagor. Lord Ch. J. TINDAL, after stating these facts, observes, "This, therefore, was a demand made by the agent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, \*and not to the lessor of the plaintiff; and if a party employs an agent who has full knowledge of circumstances, it must be presumed the principal has the same knowledge. So that the lessor of the plaintiff having recognised and availed himself of the possession of the defendant so late as April, 1830, cannot treat him as a trespasser in 1829." That case is very distinguishable from the present. The evidence in this case was only that the mortgagee had received interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest, he did not recognise the defendant as a person in lawful possession of the premises, nor did he avail himself of that possession to obtain payment of the interest.

LITTLEDALE, J. :

I cannot say that I am prepared to go to the length which the Court of Common Pleas appears to have done in *Doe v. Hales* (1). But assuming that case to have been properly decided, the present is very different, for the reasons already stated.

PARKE, J. :

The proof was, that there had been a payment of interest in respect of the original debt, but that was no recognition of the right of the mortgagor, or his tenant, to hold possession of the premises. *Doe v. Hales* only shews, that where the mortgagee recognises a party as being in lawful possession of the premises at a given time, it is not competent to him to say afterwards that at that time he was a trespasser. Here the lessor of the plaintiff never recognised the defendant as being in lawful possession.

(1) 33 R. R. 483 (7 Bing. 322).

TAUNTON, J. :

The evidence is, that the mortgagee had received interest on the money lent and advanced by him. That is no acknowledgment on his part that either the mortgagor or his tenant were in lawful possession of the premises mortgaged.

*Rule absolute.*

DOE d.  
ROGERS  
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CADWAL-  
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[ 478 ]

## MONK v. WHITTENBURY(1).

(2 Barn. &amp; Adol. 484—486; S. C. at Nisi Prius, 1 Moo. &amp; Rob. 81.)

A wharfinger, having received flour in that capacity, and without any authority to sell, disposed of it to a purchaser who had no notice of the want of authority. The wharfinger was in the habit of doing business as a flour factor: Held, nevertheless, that the Act 6 Geo. IV. c. 94, s. 4(2), which protects purchases made innocently and in the ordinary course of business from agents intrusted with goods, did not apply to this case, the wharfinger not being an agent within the meaning of the statute.

TROVER for flour and sacks. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Easter Term, it appeared that the defendant purchased the flour in question of one Cramp, who was a wharfinger, and who had, in that capacity, received the flour from the owner, the present plaintiff, but without any authority to sell it. Cramp was a flour factor as well as a wharfinger; which, it appeared, was not unusual. After receiving payment from the defendant he absconded, and never paid over the money to the plaintiff. Lord TENTERDEN thought that if the sale in question was made by an agent in the ordinary course of business, to a party not apprized at the time that such agent was unauthorized to sell, the purchaser was protected by the Factor's Act, 6 Geo. IV. c. 94, s. 4 (2); and he left it as a question for the jury, whether or not the sale was in the ordinary course of business. They were of opinion that it was not, and therefore found a verdict for the plaintiff. On a former day in this Term

1891.  
May 28.  
[ 484 ]

(1) Followed in *Cole v. North-Western Bank* (Ex. Ch. 1875) L. R. 10 C. P. 354, 44 L. J. C. P. 233.—R. C.

(2) Repealed by the Factors Act,

1889 (52 & 53 Vict. c. 45). Whether the Act of 1889 does, or does not, apply to such a case as the above, is by no means clear.—R. C.

MONK  
v.  
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BURY.

*Sir James Scarlett* moved for a new trial (1) :

[ \*485 ]

The verdict, as to the particular question put, was against evidence. It is true that, if that be so held, a question of law must arise, whether or not the vendor in this case was an "agent intrusted" with the goods within the meaning of 6 Geo. IV. c. 94, s. 4 (2) ; and it may be said on \*the other side, that although the party was agent for one purpose, that of receiving and keeping the goods, he was not thereby invested with authority for another, namely, to sell, nor did it render him such an agent as could, by selling, confer a good title on a purchaser by virtue of the statute, notwithstanding his own want of authority. But it had been held before the passing of this Act, that an owner of goods may place them in the hands of an agent under such circumstances, that an agency for the purpose of sale may be presumed in behalf of an innocent purchaser, though such agency was not in fact contemplated by the principal. The question in the present case is, whether, if a person, being a factor, receives goods from a principal without directions to sell, or any intention on the part of the principal that he should do so, and chooses, notwithstanding, to dispose of the goods in the character of a factor, a party purchasing in ignorance of the want of authority, is not protected by the statute. The meaning of the statute is, that if the buyer in such a case had not notice of the want of authority, the purchase shall not be affected. To say that the protection extends only to cases where the vendor had a general commission to sell, \*but

[ \*486 ]

(1) Before Lord Tenterden, Ch. J., Littledale, Parke, and Taunton, JJ.

(2) Which enacts, that, from and after, &c. "It shall be lawful to and for any person, &c. to contract with any agent or agents intrusted with any goods, wares, or merchandize, or to whom the same may be consigned, for the purchase of any such goods, &c. and to receive the same of, and pay for the same to such agent or agents; and such contract and payment shall be binding upon and good against the owner of such goods, &c. notwithstanding such

person, &c. shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents: Provided such contract and payment be made in the usual and ordinary course of business, and that such person, &c. shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, &c. or to receive the said purchase-money."

exceeded it in some particular, would not answer the object of the statute. The case might have been different if Cramp had been merely a wharfinger, but it was proved that he carried on business as a factor also.

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BURY.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J., now delivered the judgment of the COURT:

The material question in this case is, whether Cramp was or was not an agent intrusted with the goods in respect of which the action is brought, within the meaning of 6 Geo. IV. c. 90, s. 4. It is difficult to say precisely what is meant in this section by an "agent intrusted with goods;" but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not: and although it is true that Cramp transacted business as a factor with some persons, we do not think that can avail the defendant in the present case. There will, therefore, be no rule.

*Rule refused.*

# REX v. JAMES CORNISH.

(2 Barn. & Adol. 498—503; S. C. 9 L. J. M. C. 86.)

1831.  
May 28.

[ 498 ]

An order of justices directing A. to pay the churchwardens and overseers of the poor of a parish a weekly sum for the maintenance of B. and C., his grandsons, as long as they shall be chargeable to the parish, is good, without stating that the father is unable, absent, or dead.

Two justices ordered the defendant to pay to the churchwardens and overseers of the parish of Hockworthy, in the county of Devon, the weekly sum of 2s. 6d., for and towards the relief and maintenance of Thomas Farr and William Farr, his grandsons, as long as they should be chargeable to the parish. A rule *nisi* had been obtained for quashing the order, on the ground that it was not stated therein that the father was either dead or unable to maintain the children.

*Follett* now shewed cause:

By the statute 43 Eliz. c. 2, s. 7, it is enacted, "that the father and grandfather, and the mother and grandmother, and

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[ \*499 ]

the children of every poor, old, blind, lame, and impotent person or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their General Quarter Sessions shall be assessed." By the 59 Geo. III. c. 12, s. 26 (1), any two or more justices of the peace for the county in which any such sufficient person shall dwell, are empowered "in any Petty Session to make such assessment and order for the relief \*of every poor, old, blind, lame, impotent, or other poor person not able to work, upon and by the father, grandfather, mother, grandmother, or child (being of sufficient ability), of every such poor person, as may by virtue of the said Act be made by the justices in their General Quarter Sessions." The question is, whether the justices, by this statute, are compelled, in the first instance, to make an order of maintenance on the father, if he be living and able to maintain? And, secondly, if they be, whether it must appear on the face of any order upon the grandfather, that the father is not living, or able? It is undoubtedly stated in 4 Burn's Justice, p. 166 (26th edit.), on the authority of *The Queen v. Joyce*, 16 Vin. Ab. tit. Poor (C) pl. 3, that "though the father be living, yet if he be unable, the grandfather, being of ability, may be compelled to keep the grandchild, and also to pay so much money as the justices shall think reasonable for the time past." And Mr. Nolan, in his Treatise on the Poor Laws, vol. ii. p. 263 (4th edit.), upon the authority of the same case, lays down the same position. The question, however, must turn on the construction of the Act of Parliament, by which the legal obligation on a grandfather to maintain his grandchildren is created. The enactment of the statute of 43 Eliz. c. 2, s. 7, is not merely that the grandfather shall be liable to maintain his grandchildren in case the father is not able, but it is absolute that the father and grandfather, if of sufficient ability, shall maintain such poor persons. And this is not varied by 59 Geo. III. c. 12, s. 26. But assuming the true construction of the statutes to be, that the grandfather is

(1) Varied by 31 & 32 Vict. c. 122, s. 36.—R. C.

not to be called upon unless the father be unable, still it is not necessary that that inability should be stated on the face of the order. The justices are \*only bound to set out such facts as are necessary to give them jurisdiction.

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v.  
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[ \*500 ]

*Rogers, contra :*

If the justices are bound to inquire into the circumstances of the father before they rate the grandfather, and if their power to rate the grandfather only arises upon the father's inability, then they are bound to shew that inability upon the face of the order as a necessary step to found their jurisdiction. Now it may be admitted that the statute does not seem in terms to require that such a statement should appear on the order; but looking at its object and spirit, such will be found to be the most reasonable construction. The duty of providing for children was a duty of imperfect obligation, and the statute was made to enforce it. In *Rex v. Munden*(1) PRATT, Ch. J. says, "There being no temporal obligation to enforce the law of nature, it was found necessary to establish it by Act of Parliament, and that can be extended no further than the law of nature went before." If, therefore, the object of the Act was merely to enforce the law of nature, it is to that law we must look for the right construction of the Act. Now, by the law of nature, the duty of providing for a child falls, in the first instance, upon a parent, and a more remote relation cannot be chargeable with it, unless the parent is unable, or dead, or absent. Were this otherwise, it would lead to the monstrous conclusion, that a father might be living in affluence and splendour, and have deserted his children, and a magistrate might, nevertheless, pass him over, and charge the grandfather with their maintenance; if a \*magistrate may do this, the present order is good, but if not, then he must account, in some way, why he does not charge the father before he proceeds to make an order on the grandfather. The authorities on this point are certainly scanty; but it does happen, that in all the reported cases, where an order has been made on a more remote relation, and the order is set out, the reason for not making the order on the person immediately chargeable has been

[ \*501 ]

(1) 1 Stra. 190.

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always stated, viz. too poor, dead, or beyond sea. In *Regina v. Joyce* (1) the order stated that "the grandfather should keep the grandchild, the father being living but unable to do it." In a case cited, Vin. Abr. Poor, (C) pl. 5 in marg., "a father was ordered to allow a maintenance to a son's wife, he being beyond sea." And, although this order would be now held bad on another ground, namely, that the statute only extends to natural relations (*Rex v. Munden* (2)), yet it shews the practice, that where a remote relation is to be charged, the reason why the order is not made upon the person immediately liable must be assigned. So also in *Rex v. Robinson* (3), which was an indictment for disobeying an order of this description, Sir James Burrow, who was a great Sessions lawyer, in the marginal note says, "The order recites the death of the father of the children, their being destitute of subsistence, the complaint of the parish, the ability of the grandfather to maintain them, and other proper foundations for such an order." So also Mr. Nolan (4), speaking of *Regina v. Joyce*, says, that although the father be living, yet if he be unable, the grandfather, being of sufficient ability, may be compelled to keep the \*grandchildren. Upon the authority, therefore, of precedents and practice, as well as upon the reasonable construction of the statute, this order is bad, being made *per saltum* on the grandfather, and no reason stated why the father is not charged.

[ \*502 ]

LORD TENTERDEN, Ch. J. :

The question is, whether the magistrates, to justify the making a charge upon the grandfather, were bound to state on the face of their order that the father was dead, or unable to support his children? There is nothing in the Act of Parliament to shew that the obligation of the grandfather is absolute only in the event of the father being unable; and that being so, I think the justices who made this order were not bound to assign on the face of it any reason why they made it on the grandfather.

LITLEDALE, J. :

I think it was not necessary that the justices should, in their

(1) 16 Vin. Abr. 423, tit. Poor, C.  
pl. 3.

(2) 1 Stra. 190.

(3) 2 Burr. 799.

(4) 2 Nolan, 263, 264.

order upon the grandfather, account for the father. It seems to me that the statute gives the justices a discretionary power, and if the grandfather be a rich man and the father a poor man, they may, in the exercise of that discretion, make an order on the former to maintain his grandchildren.

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CORNISH.

PARKE, J.:

I am disposed to agree upon the construction of the statute in what has been laid down: and at all events, I think the magistrates were not bound to state in the order, that the father was either dead or unable to maintain his children.

TAUNTON, J.:

I am also of opinion that it was not necessary for the justices to state in their order that the \*father was not of sufficient ability to support his children; for in the case of an order the Court will intend that the justices have done right, if the contrary does not appear on the face of it.

[ \*503 ]

*Rule refused.*

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WHARTON, ESQUIRE, v. KING.

(2 Barn. & Adol. 528—542; S. C. 9 L. J. K. B. 271; S. C. at Nisi Prius, 1 Moo. & Rob. 96.)

1831.  
May 31.  
[ 528 ]

Declaration stated, that differences had arisen between the plaintiff and defendant respecting certain liabilities of the plaintiff on account of the defendant, in respect of bills of exchange to which the plaintiff had put his name, and which the defendant had negotiated; that the plaintiff had commenced an action against the defendant on account of his having negotiated the same, and also for the recovery of the bills; and that by an order made in the said action, the cause and all matters in difference between the parties were referred to arbitration. That the arbitrator made his award, whereby he directed the defendant to pay the plaintiff 10s., and that the defendant should, at the same time, deliver up to the plaintiff a bill of exchange for 300*l.*, therein particularly described, or give the plaintiff a bond of indemnity; and further, that the defendant should, at the same time, pay the plaintiff 343*l.*, unless he, the defendant, should then pay what remained due upon a judgment recovered by A. and others against the defendant, in a certain action brought by the said A. and others against the plaintiff, as the drawer of a certain bill of exchange for 300*l.*, bearing date the 18th of May, 1826, drawn by defendant upon, and accepted by, one C. N., and payable to the order of the defendant, and by him indorsed to the said A. and

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others, and likewise cause satisfaction to be entered on the judgment-roll in such action; and likewise deliver up to the plaintiff the last-mentioned bill of exchange: And the arbitrator further awarded, that on performance of the award as aforesaid, the plaintiff and defendant should execute mutual and general releases.

Plea, first, that a bill of exchange, therein particularly described, had been drawn, indorsed by the plaintiff, and by him delivered to the defendant: and that the liability of the plaintiff, in respect of the same, was a matter in difference submitted to the arbitrator, and that he had not awarded concerning it.

Secondly, the like as to an action which was depending between the plaintiff and defendant at the time of the reference, and to divers other pecuniary matters, claims, and demands.

Thirdly, the like as to a judgment recovered by A. and others against the plaintiff, which was unsatisfied at the time of making the award, and which it was disputed whether the plaintiff or defendant ought to satisfy.

Fourthly, that there never was any judgment recovered, or action brought, by A. and others against the defendant on any such bill of exchange drawn by the defendant, as was mentioned in the award, and that performance of the award as to such judgment was impossible.

Fifthly, that the defendant never had any authority from A. and others to cause satisfaction to be entered on the judgment-roll, in such last-mentioned action, and, therefore, that it was wholly out of his power to do so; nor was it in his power to deliver up to the plaintiff the bills of exchange in the award mentioned, and which were indorsed to and outstanding in the hands of other persons.

Upon demurrer; it was held,

That the first three pleas were bad, because the arbitrator, by having awarded mutual and general releases, must be deemed to have adjudged and finally decided upon the matters in those pleas respectively mentioned, and the general release would be an answer to any actions or claims founded upon them:

And, that the fourth and fifth pleas were bad, because, although it might be impossible for the defendant to perform certain parts of the award therein mentioned, yet the award in each instance gave an alternative which he could perform.

DECLARATION stated that differences had arisen between the plaintiff and the defendant, respecting certain liabilities of the plaintiff, for and on account of the defendant, in respect of certain bills of exchange \*to which the plaintiff had put his name without any consideration, and which the defendant had negotiated; that the plaintiff had commenced an action in the King's Bench against the defendant, for damages, on account of his having so negotiated the said bills, and also for the recovery of the said several bills of exchange, which action, at the time of making the order next mentioned, was depending; and that afterwards, by an order of the Honourable Mr. J. LITLEDALE, the said cause,

and all matters in difference between the parties, were referred to the arbitrament of A. B., Esquire, so as he should make and publish his award in writing, of and concerning the matters referred on or before a day therein mentioned.

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The declaration then stated mutual promises to perform the award, and averred that on the 8th of January, 1830, the arbitrator made and published his award of and concerning the matters referred to him, whereby he awarded that the defendant should pay to the plaintiff 10*s.* on the 1st of February then next, and that the defendant should, at the same time, deliver up to the plaintiff a certain bill of exchange for 300*l.*, bearing date the 7th of July, 1826, drawn by the defendant upon, and accepted by the plaintiff, payable six months after date to the defendant's order, and by him delivered before the same became due to one A. Hunter; or instead thereof should, at the same time, give the plaintiff his bond for 600*l.*, conditioned to indemnify the plaintiff against all demands, loss or damage, by reason of the last-mentioned bill; and also that the defendant should, at the same time, pay to the plaintiff the further sum of 343*l.* 10*s.* unless he, the defendant, should, on the said 1st of February, pay and satisfy \*what remained unpaid upon a certain judgment theretofore recovered by W. Tottie, J. Richardson, and M. Gaunt, against the defendant (1), in the Court of King's Bench, in a certain action brought by the said Tottie, Richardson, and Gaunt against the plaintiff, as drawer of a bill of exchange for 300*l.*, bearing date the 18th of May, 1826, and drawn by the said defendant upon, and accepted by one Conyers Norton, payable six months after date to the order of the said defendant, and by him indorsed and paid away to the said Tottie, Richardson, and Gaunt; and likewise, at his own costs, cause satisfaction to be entered on the judgment-roll in such action; and likewise deliver up to the said plaintiff the last-mentioned bill of exchange. (There was a similar clause, which it is unnecessary to notice further, respecting a judgment in another action on bills of

[ \*530 ]

(1) The arbitrator by mistake inserted the word "defendant" instead of "plaintiff." The bill was drawn by the plaintiff, payable to his own

order, indorsed by him to the defendant, and by the defendant to Tottie, R., and G., who obtained judgment upon it against the plaintiff.

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exchange.) And it was further awarded, that on the performance of the said award as aforesaid, the plaintiff and defendant should, at the costs of the party requiring the same, execute and deliver to each other mutual and general releases of all actions, causes of action, and claims and demands whatsoever, down to the day of the said order of reference:—of which award the defendant afterwards had notice. Breach, first, nonpayment of the 10s.; secondly, that the defendant, although requested, did not deliver to the plaintiff the bill of exchange for 300*l.*, or give his bond to indemnify the plaintiff; thirdly, that the defendant did not pay or satisfy what remained unpaid upon the judgment recovered \*by Tottie and others against the plaintiff as the drawer of the bill for 300*l.*, nor cause satisfaction to be entered on the judgment-roll in such action, nor deliver up to the plaintiff the said last-mentioned bill; and that although the defendant, on the said 1st of February, was requested to pay the sum of 343*l.* 10s. in the award mentioned, yet he did not do so.

Pleas, first, that a certain bill of exchange, bearing date the 18th of May, 1826, had been drawn by the plaintiff on one Conyers Norton, for the payment, six months after date, to the plaintiff's order, of 300*l.*, and had been indorsed and delivered by the plaintiff to the defendant, and that the liability of the plaintiff as the drawer of such bill was a matter in difference between the plaintiff and defendant, referred and submitted to the arbitrator, and upon which he was requested by the defendant to award, but that he had not done so. Second plea, that a certain action commenced by the plaintiff against the defendant and depending in the King's Bench, and also divers other pecuniary matters, claims, and demands in law and in equity between the said parties, were matters in difference referred and submitted to the arbitrator, and upon which he was requested by the defendant to award, but that he had not done so. Third plea, that a judgment had been recovered by Tottie, Richardson, and Gaunt, in K. B. against the plaintiff, which was unsatisfied at the time of making the award; that whether the plaintiff or defendant should pay the money so recovered, and unsatisfied, was a matter in difference referred to the arbitrator, and upon which he was requested by the defendant to award, but he did

not do so, nor had he by his award ascertained the sum recovered by or \*remaining unsatisfied upon the said judgment. Fourth plea, that there never was any judgment recovered or action brought by Tottie, Richardson, and Gaunt against the defendant on any bill of exchange drawn by the defendant, bearing date the 18th of May, 1826, nor was there ever any such bill drawn by the defendant, and in those respects the award is founded on error; and the performance of those parts thereof which relate to such supposed bill and judgment is impossible. Fifth plea, that the defendant never had any lawful authority from Tottie, Richardson, and Gaunt, or either of them, to cause satisfaction to be entered on the judgment-roll in the said action in the award mentioned to be brought by them; and that at the time of making the award, and ever before and since, it was wholly out of the power of the defendant to cause satisfaction to be entered on such judgment-roll, or to procure or deliver up to the plaintiff either of the said several bills of exchange in the award mentioned, and which had been and were respectively indorsed to and outstanding in the hands of other persons. Demurrer.

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*Miller*, in support of the demurrer :

The first plea is bad, because the matter therein stated was disposed of by the award of general releases. It is immaterial whether the bill of exchange therein mentioned be specifically arbitrated on, provided the matter was under the arbitrator's notice, (which the plea admits,) and the award be sufficiently comprehensive to dispose of it: *Shelling v. Farmer* (1). *Birks v. Trippet* (2) is expressly in point. Every intendment is to be made in favour of an award, \*and none against it. Here the plea states that the bill had been drawn in May, 1826, by the plaintiff on C. Norton for the payment, six months after date, to the order of the plaintiff, of the sum of 300*l.*, and that it was indorsed and delivered by the plaintiff to the defendant. According to the plea, therefore, it was overdue three years in the defendant's hands. No possible legal liability could arise, except between these parties, and that would be extinguished by a general release. Then, as to the second plea, the action in which the present order

[ \*533 ]

(1) 1 Stra. 646.

(2) 1 Saund. 32.

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of reference was made, is stated to have been brought in respect of certain bills indorsed away by the defendant, and the award directs 10s. to be paid to the plaintiff, and then certain judgments recovered on bills of exchange against the plaintiff are to be satisfied, or sums equal to the respective debts and costs are to be paid, and the plaintiff is to give the defendant a release of all actions and causes of action, &c. There is enough, therefore, looking through the award, to shew that the whole has been determined, which is sufficient: *Jackson v. Yabsley* (1). The third plea is bad, because it tenders an immaterial issue. It is perfectly irrelevant whether the matter there mentioned be expressly and specifically disposed of or not, if the words of the award are sufficient to comprehend it. Now, first of all, the question as to the liability of the defendant to satisfy a judgment recovered against the plaintiff is disposed of by the award of mutual and general releases. The judgment recovered is against the plaintiff alone. He alleges against the defendant that he is bound to pay off this judgment. The arbitrator says that the defendant shall discharge \*the plaintiff's liability in respect of the judgment (which was evidently upon one of the bills of exchange in question); and that the plaintiff shall give him a release from all claims. That release extinguishes for ever any claim on this judgment, and no assignment of it can raise any other liability. Secondly, the question as to the liability on these judgments is disposed of, because they are included in the present action. The declaration shews that the action was brought to recover damages for the consequences to the plaintiff of the defendant having negotiated certain bills; and the award shews that some of those consequences were actions upon those bills, in which judgments were recovered. The Court, therefore, may reasonably intend these judgments to be included in the grounds of action. Then, as to the fourth plea, that there never was any such judgment recovered by Tottie, R. and G. against the defendant as stated in the award, and, therefore, that the performance of the award as to such judgment was impossible: that plea is bad, because, as the award gives the defendant an alternative option of doing two things; the plea raises an

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(1) 5 B. & Ald. 848.

immaterial and irrelevant issue, and puts in issue matter of law. The award in reality does not mean to say that there were any such judgments recovered, or any action against the defendant, or any bills drawn by the defendant; that is a mere clerical error. And, suppose this direction to be an impossible thing, it does not vitiate the remainder of the award: *Alder v. Savill* (1); and as the plea goes to the whole count, it is bad; but besides, there is an alternative which is both possible and certain, namely, \*the payment of the 34*l.* 10*s.*; and if an award direct one of two things to be done, and either of the two is uncertain or impossible, it is incumbent on the party to perform the other: *Lee v. Elkins* (2), *Simmonds v. Swayne* (3). This last answer applies also to the fifth plea.

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*Lawes, Serjt. contrà :*

The first three pleas are good. Here it was a condition of submitting to the award, that it should be made on all the points referred. The pleas allege that the matters therein mentioned were matters submitted to and not decided by the arbitrator, and that allegation is admitted by the demurrer. Those pleas, therefore, shew that the award is not final: *Bradford v. Bryan* (4), *Randall v. Randall* (5), *Ingram v. Milnes* (6), *Mitchell v. Staveley* (7).

(LORD TENTERDEN, Ch. J. : In *Birks v. Trippet* (8) the Court was of opinion that the arbitrator by awarding mutual releases had adjudicated upon matters not mentioned specifically in his award.)

That was not the point decided, for the plaintiff in that case having demurred to a plea which called in question the validity of the award, *Saunders* for the defendant objected to the declaration, that the promise being to pay a collateral sum on request, an actual request was necessary before action brought, and should have been specially averred; and upon that ground judgment was given for the defendant. The case is always cited for that

(1) 15 R. R. 551 (5 Taunt. 454).

(2) 12 Mod. 585.

(3) 1 Taunt. 549.

(4) Willes, 268.

(5) 8 R. R. 601 (7 East, 81).

(6) 8 East, 445.

(7) 14 R. R. 287 (16 East, 58).

(8) 1 Saund. 32.

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point, and not to shew that an award of general releases is a decision of every \*specific matter submitted to the arbitrator. Besides, in that case the releases were to be executed upon the payment of a specific sum of money by the defendant to the plaintiff. Here the arbitrator directs that on the performance of his award as aforesaid, the parties shall execute to each other mutual and general releases. Either party's title to require a release might depend upon what remained unsatisfied upon Tottie's judgment, and that is left uncertain by the award. Would a plea of full payment and satisfaction by payment of a certain sum upon the judgment have been good in this case as to the 343*l.* 10*s.*? and might not the plaintiff have replied that more was due; and if so, the award is not rendered final in this respect by the releases. Or, suppose, in an action brought by the defendant against the plaintiff for not giving a release on request, performance of the award by the defendant was averred, and payment of a specific sum as being all that was due upon the judgment, could not the present plaintiff, in defence to such an action, plead that more was due? Besides, the performance of some parts of the award is impossible. The defendant, therefore, never could entitle himself to a release. The matter omitted by the arbitrator, as stated in the third plea, was not respecting a mere debt from one party to the other, as in *Birks v. Trippet* (1), but regarded the liability of the defendant to satisfy a judgment recovered against the plaintiff.

(PARKE, J.: The defendant could only be bound to satisfy a judgment recovered against the plaintiff by reason of some contract, and a general release would discharge him from any action on that contract.)

[ \*537 ] The plaintiff being *primâ facie* liable on the judgment, the question submitted to the arbitrator was, whether the defendant was bound to indemnify him.

(PARKE, J.: If the plaintiff had executed a release of all actions and causes of action, suits, bills, bonds, debts, covenants,

(1) 1 Saurd. 32.

claims, and demands whatsoever, could there be a doubt that it would have put an end to every claim upon the defendant as to these judgments?)

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In *Pope v. Brett* (1), an award directed that A. should pay B. the money due for "task-work and day-work;" that B. should pay A. 25*l.*; and thereupon that general releases should be given mutually; and it was held that the uncertainty of that part of the award which had reference to the task-work and day-work vitiated the whole; since from its being void in that particular, B. would be deprived of what was to form a consideration for the 25*l.* to be paid, and the general release to be executed by him. So in this case, the releases are only to be given on the performance of the award as aforesaid, that is, on performance of every part of the award; and a part of the award is, that the defendant shall pay the plaintiff 343*l.* 10*s.* unless he shall before the 1st of February pay what remains unsatisfied upon a judgment recovered by Tottie, and likewise cause satisfaction to be entered on the judgment-roll. It would not have been sufficient, therefore, if the defendant had got satisfaction entered on the roll, unless it could be shewn that he had paid what was due on the judgment; and what that was, might afterwards be a matter of dispute.

(LORD TENTERDEN, Ch. J.: If he had got satisfaction entered, that would have been evidence that he had paid what was due.

PARKE, J.: At any rate, \*he might release himself from all uncertainty by paying 343*l.* 10*s.*)

[ \*538 ]

That might be inserted as a penalty; the debt might be less than that sum. The fourth plea is good, because it shews that the award is not according to the submission, and that there is an error of fact on the face of it, which renders performance impossible. If this were a mere clerical mistake, it should have been so stated in the declaration. An award which is legally impossible is void: *Alder v. Savill* and others (2), *Harris v.*

(1) 2 Saund. 292.

(2) 15 R. R. 551 (5 Taunt. 454).

WHARTON *Curnow* (1); and the impossibility affects any claim to releases.  
 v.  
 KING. The fifth plea is good for the same reasons.

*Miller*, in reply:

The demurrer admits those facts in the plea only which are well pleaded. If the award of general releases amount, in point of law, to a decision by the arbitrator of the several matters mentioned on the pleas, then it is not well pleaded that there were matters submitted which the arbitrator has not decided. The demurrer, therefore, does not admit the truth of that allegation.

LORD TENTERDEN, Ch. J. :

I am very glad that the case of *Birks v. Trippet* (2) enables us to give judgment in favour of the plaintiff according to the law, as it undoubtedly will be according to the justice of this case. The first plea states, that a certain bill of exchange, bearing date the 18th of May, 1826, had been drawn by the plaintiff on one C. Norton for payment, to the order of the plaintiff, of 300*l.*, and that that had been indorsed and delivered by the plaintiff to the defendant, and that the liability of the plaintiff as drawer of the \*bill to pay it, was a matter in difference between the plaintiff and defendant, and referred and submitted to the arbitrator, and that he had not made any award on the subject. To this plea, there is a general demurrer, and it is said that, by that demurrer, the plaintiff has admitted the fact alleged in the plea, that the arbitrator had not awarded concerning that matter in difference. Now, in *Birks v. Trippet*, which was an action of assumpsit upon an award, whereby the arbitrator directed the defendant to pay 6*l.* to the plaintiff, and that upon payment of that sum the parties should execute to each other general releases, the defendant pleaded in bar "that the plaintiff was indebted to him, being an attorney, in 4*l.* for fees and expenses, and before the making of the award he gave notice thereof to the arbitrator, and offered to make it appear to him, and prayed he would allow it in his award; but the arbitrator made his award without any allowance or consideration of the said 4*l.*, notwithstanding such notice and proof;" and to this plea there was a demurrer, as in

[ \*539 ]

(1) 2 Chitty, 594.

(2) 1 Saund. 32.

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the present case. The argument was, "that the award was good, because the arbitrator had awarded general releases from both parties; and although the defendant had notified his debt to the arbitrator, yet the arbitrator was not bound to allow it, for perhaps he did not deem it to be a just debt, and therefore did not allow it; and the arbitrator was the judge of it, and had given his judgment that the plaintiff should be released by the defendant, and so he had made his award thereof, and of all other differences whatsoever; and of such opinion was the Court." The opinion so given by the Court is an authority to shew, that by the award of general releases in this case, the arbitrator must be deemed to \*have taken into consideration the matter mentioned in the first plea, and that the defendant is entitled to judgment on the demurrer to that plea. The same observation applies to the second plea. The award has undoubtedly put an end to the action; for the arbitrator has not only ordered money to be paid, but a general release, which would clearly put an end to it. As to the third plea, the liability of the defendant to satisfy any judgment recovered against the plaintiff could only arise from contract, and a general release would be an answer to any action on such contract. Then, as to the fourth plea, which states that the performance of a part of the award is impossible, supposing that to be so, the answer is, that the alternative is possible and certain, viz., the payment of a sum of money, and that being the case, the defendant is bound to perform the thing which is possible. The same observation applies to the fifth plea. The plaintiff is therefore entitled to judgment on all the pleas.

[ \*540 ]

LITLEDALE, J. :

I am of the same opinion. *Birks v. Trippet* (1), shews that the award of releases amounts to a determination by the arbitrator as to the bill mentioned in the first plea, and the action mentioned in the second. As to the question whether the plaintiff or defendant were liable upon the judgment mentioned in the third plea; considering the nature of this reference, and that the differences had arisen (as is said in the declaration) respecting liabilities of the plaintiff on account of the defendant, in respect of certain

(1) 1 Saund. 32.

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bills of exchange to which the plaintiff had put his name, and which the \*defendant had negotiated; and that, the judgment mentioned in that plea having been given against the plaintiff, the question was, whether the plaintiff should satisfy that judgment, or the defendant, for him; we must intend that there was some contract to render the defendant liable to satisfy the judgment so recovered against the plaintiff, and whatever that was, a general release would operate as a discharge from it. As to the objection taken to the award on the fourth and fifth pleas, that it was impossible, or out of the power of the defendant, to perform it, the answer is, that he may relieve himself from all uncertainty by payment of a stated sum.

PARKE, J. :

[ \*542 ]

I am also of opinion that there ought to be judgment for the plaintiff. Many of the objections to this award are founded upon that which is manifestly a clerical mistake, the insertion in the award of the word "defendant" instead of "plaintiff." The objection taken to the award by the first plea is, that a question as to the liability of the plaintiff as drawer of the bill therein mentioned, was submitted to and not decided by the arbitrator; but the award of mutual and general releases is a final decision of that question, and a complete adjudication upon it in point of law. That was the first point decided in *Birks v. Trippet* (1). Then as to the second plea, the same answer applies: the arbitrator by the award of general releases has put an end to the action there mentioned, and all other claims and demands both at law and in equity. The general release might be pleaded to the action either in bar or *puis darrein continuance*, or taken advantage of \*by *auditâ querelâ*. Then as to the third plea, the question submitted whether the defendant was bound to indemnify the plaintiff against the judgments mentioned in the said plea could only arise from some contract by the latter to indemnify. If so, a general release would put an end to all questions upon such contract; for it would operate as a discharge from all contracts, executory or executed. The award therefore decides that question. Then as to the fourth plea. If there never was

(1) 1 Saund. 32.

any such judgment recovered against the defendant as is therein mentioned, that was not a matter referred, but still the award would only be bad as to that. Then it is said that, as there was no such judgment as that mentioned in the award, it was impossible for the defendant to pay any sum due on such judgment, or cause satisfaction to be entered on that judgment-roll. Assuming that to be so, he might have paid the sum awarded by the arbitrator. That disposes of the fourth as well as of the fifth plea. The decision of the Court as to mutual releases in *Birks v. Trippet* (1), appears not to have been adverted to in *Mitchell v. Staveley* (2); and in the latter case it did not clearly appear, by the seventh plea on which the judgment proceeded, that mutual releases were awarded, and, at all events, the attention of the Court was not directed to that point. *Birks v. Trippet* does not decide that an award of mutual releases would be an adjudication of a collateral matter not arising out of any contract between the parties to the submission, but that it is an adjudication of any claim resulting from such contract. The judgment of the Court must be for the plaintiff.

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TAUNTON, J. concurred.

*Judgment for the plaintiff.*

### SIMSON v. MOSS.

(2 Barn. & Adol. 543.)

A hawker's licence does not give the privilege of selling goods in a borough, where, by a bye-law made pursuant to charter and ancient custom, strangers are not permitted to trade.

1881.  
June 1.  
[ 543 ]

THIS was an action of debt brought by the chamberlain of the borough of Hertford, against the defendant, for trading in the said borough without being free of the same, or authorized or empowered by Act of Parliament so to do, contrary to a bye-law of the borough, made agreeably to ancient custom and by virtue of a charter granted to the burgesses and inhabitants by King Charles the Second. The defendant pleaded a licence duly obtained by him, under the several statutes in that case made and provided, to trade as a hawker and pedlar. Demurrer and joinder.

(1) 1 Saund. 32.

(2) 14 R. R. 287 (16 East, 58).

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*F. Pollock* was now to have supported the plea. But,

Per CURIAM :

This plea cannot be maintained. The Act 8 & 9 Will. III. c. 25, which was the first statute for licensing hawkers, contained an express provision (s. 17) that nothing in that Act should extend to give power to any hawker to sell wares or merchandizes in any city, borough, town corporate, or market town within this realm, otherwise than might have been done before the Act passed. That clause has been omitted in subsequent Acts, and it was not necessary it should have been inserted; for the Legislature could not be supposed to intend that the granting of a hawker's licence should give the franchise of trading in all corporate towns throughout the realm.

*Judgment for the plaintiff.*

1831.  
*June 1.*  
[ 544 ]

## HILL v. THE PROPRIETORS OF THE MANCHESTER AND SALFORD WATER WORKS (1).

(2 Barn. & Adol. 544—554; S. C. 1 L. J. (N. S.) K. B. 230.)

An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent or unlawful.

Where a Company, authorized by Act of Parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the Act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew; the pleas not disclosing any fraud, or injury done to the shareholders in the Company.

DEBT on two bonds, each in the penal sum of 200*l.*, bearing date the 13th of August, 1813, and 21st of December, 1814. By the condition of the first-mentioned bond, which was set out on oyer, it was recited that the Company were, by an Act of Parliament (53 Geo. III. c. xx.), authorized to raise, in addition to certain monies already raised by them under a former Act (49 Geo. III. c. xcii.), any sum or sums of money not exceeding 100,000*l.*, in such proportions as they should think fit, and for

(1) Cited and distinguished in *In re Sheffield Building Society, Ex parte Watson* (1888) 21 Q. B. D. 301, 302, 57 L. J. Q. B. 609, 610, 59 L. T. 401. —R. C.

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[ \*545 ]

such purposes as in the first-mentioned Act were expressed, by mortgage on the undertaking, or annuities to be charged thereon, or, if they should think it more expedient, by bonds or promissory notes under the seal of the Company, payable with interest, and with or without power in the holder to have an option of being admitted to hold a share of 100*l.* in lieu of their principal money or such part thereof, not less than 100*l.*, as should be agreed on. The condition then stated a resolution of the Company, for the purpose of raising part of the money authorized to be raised by 53 Geo. III. c. xx., to issue bonds for 100*l.* each, bearing interest, and payable in five \*years, with option to the holder, at the end of that time, to take a share of 100*l.* in the stock of the Company in redemption of his bond, or to be paid in money. It then proceeded, "And whereas the said Samuel Hill" (the plaintiff) "hath this day paid and advanced to the said Company of Proprietors the sum of 100*l.*, upon the terms in the said resolution mentioned, as they do hereby admit, now the condition of the above-written obligation is such," &c. The condition was, that at the end of five years the plaintiff should, at his option, be repaid his principal, or admitted a proprietor of one share of 100*l.*; and that in the mean time he should be paid 5*l.* a year interest. The condition of the second bond was similar, except that this bond was given for eighteen months only.

The defendants pleaded, as to the first bond, several pleas. The fifth stated, in substance, that the Company was incorporated by the Act 49 Geo. III. c. xcii., for the purposes in that Act mentioned, and for no other, and was the same Company as is mentioned in 53 Geo. III. c. xx.; and that the bond was made and executed by them under colour of borrowing thereupon the sum of 100*l.* for the purposes in the last-mentioned Act specified in that behalf, pursuant to the provisions in the same relative to the borrowing of money by the Company on bond; but that, in fact, they did not borrow the said sum of 100*l.*, or any other sum, upon the said bond from the said Samuel Hill, or from any other person, for the purposes in the same Act contained, as the said Samuel Hill at all times hitherto well knew; nor did the said Samuel Hill, or any other person, lend the Company the said sum of 100*l.*, or any other sum, upon the said bond, for the

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purposes in the last-mentioned Act specified, as the \*said Samuel Hill at all times hitherto well knew ; wherefore the said writing in the said declaration first mentioned was and is wholly void.

The sixth plea, relating to the same bond, stated, that it was made and executed by the Company, with the intent of borrowing 100*l.* thereupon for the purposes specified in the Act 53 Geo. III. c. xx., pursuant to the provisions in that Act as to raising money on bond ; that the Company did borrow of the plaintiff the said 100*l.* on the security of the said bond, and executed and delivered the same to secure that sum and interest, as in the condition was mentioned ; and thereupon the plaintiff became, and still was, entitled to all the privileges and benefits of a claim or lien on the rates and sums of money in the last-mentioned Act referred to ; that the Company had in like manner borrowed divers large sums of money from other persons on bond, for the purposes of, and pursuant to the last-mentioned Act, which bonds were still unsatisfied, and which persons were also entitled to a lien on the said rates and sums in the Act mentioned ; and that the Company had also executed mortgages on their undertaking and works to a large amount, pursuant to the last-mentioned statute, and that the sums borrowed on such mortgages were still due. There were two pleas, the tenth and eleventh, as to the other bond, precisely similar to these.

The fifth and tenth pleas were specially demurred to, on the ground that the defendants were estopped from pleading the matter therein alleged, by their own acknowledgments in the conditions of the respective bonds. To the sixth and eleventh pleas there were general demurrers. The defendants joined in demurrer.

[ \*547 ] By the stat. 49 Geo. III. c. xcii. the Company was incorporated \*for the purpose of making, completing, improving, and maintaining water works, aqueducts, reservoirs, and other works necessary for affording a sufficient supply of water to the inhabitants of Manchester and its neighbourhood, as in the recital of the Act was particularly mentioned ; and they were authorized (by sect. 9) to raise money for putting the Act in force. The Act 53 Geo. III. c. xx. s. 1 (reciting the former statute), provided as follows :

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“ That it shall and may be lawful to and for the Company of Proprietors of the Manchester and Salford Water Works to raise and contribute among themselves, for the purposes of the said recited Act, in addition to the money which has already been raised by them under the powers of the said recited Act, for the purposes thereof, any sum or sums of money, not exceeding in the whole the sum of one hundred thousand pounds, in such proportions as they shall think fit; and which said sum of money, when raised, shall be laid out and applied by the said Company of Proprietors, in the first place, in discharging the expenses of obtaining and passing this Act, and reimbursing to the proprietors of the said undertaking all such sum and sums of money as shall have been advanced and paid by them, or any of them, for the purposes of carrying the said recited Act into execution, and paying all such sum and sums of money as the said Company of Proprietors are now liable to pay, or to be called on for the like purpose, and for otherwise carrying the purposes of the said recited Act and of this Act into execution.”

The said sum of 100,000*l.* was to be raised by new shares, or by mortgage or annuities; and with respect to such mortgages it was provided by sect. 8, that all \*mortgagees should be equally entitled to the respective portions of the monies and premises assigned to them, according to the sums advanced, to secure the re-payment of such sums and interest, without any preference by reason of priority of mortgages, or on any other account.

[ \*548 ]

By sect. 10 of the same Act, the Company were also empowered to raise money by bonds or promissory notes, as stated in the condition of the bond first mentioned in this case. With respect to these it was provided as follows: “ And the rates and sums of money authorized to be taken, and which shall arise and be taken by virtue of this Act, shall be security for any sum or sums of money so to be borrowed as last aforesaid, with interest, to the person or persons who shall from time to time be entitled to such securities, and the principal money and interest thereby secured; and all persons to whom any such securities as aforesaid shall be given, shall be equally entitled to a claim or lien on the said rates and sums of money, in proportion to the respective sums mentioned thereby to be secured and advanced, as if the

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same were advanced upon mortgages or assignments of the said rates, or in the purchase of annuities in pursuance or by virtue of this Act, and without any preference by reason of the priority of date of any such securities, or on any other account whatsoever."

*Butt* in support of the demurrers :

[ \*549 ]

The fifth and tenth pleas are bad, because the defendants are estopped, by their own recitals in the bonds to which those pleas relate, from alleging that the sums in question were not lent to them by the plaintiff for the purposes of the Act \*53 Geo. III. c. xx. In *Shelley v. Wright* (1), an obligor, who in the recital of a bond had admitted the receipt of monies due to the plaintiff, the obligee, was held to be estopped from pleading that he had not received such monies as due to the plaintiff. The same doctrine was held in *Rowntree v. Jacob* (2), though a strong suspicion was raised of fraud in the obligee. *Hosier v. Searle* (3), *Lampon v. Cork* (4), and *Baker v. Dewey* (5), also shew that where a party has expressly admitted a fact under his hand and seal, he is estopped from disputing that fact. So in Com. Dig. Estoppel (A 2), it is said that in all cases where the condition of a bond has a reference to any particular thing, the obligor shall be estopped to say that there is no such thing. Authorities to the same effect are given in 1 Wms. Saund. 215, n. 2. In the present case the condition of each bond does expressly state a particular fact, and the obligors cannot now contradict it. As to the sixth and eleventh pleas, the argument on the other side must be, that no action at all can be brought upon the bonds, so as to give one obligee precedence of the others. This must be collected, if at all, from the tenth section of 53 Geo. III. c. xx. But by that section the bonds may be given, payable at such times as the Company think fit; and if one be payable in the present year, and another ten years hence, it cannot be the meaning of the Act that the first shall not be put in force till the second is due. *Doe dem. Banks v. Booth* (6) is the same in principle with this case. There it was provided, by a Turnpike

(1) Willes, 9.

(2) 2 Taunt. 141.

(3) 2 Bos. & P. 299.

(4) 24 R. R. 488 (5 B. & Ald. 606).

(5) 1 B. & C. 704.

(6) 5 R. R. 575 (2 Bos. & P. 219).

Act, that all mortgagees of the tolls, &c., should be creditors upon them \*in equal degree, and should have no preference in respect of the priority of any money advanced: and it was held, that a mortgagee of part of the tolls, and of the toll-houses, might bring ejectment for the toll-houses, in order to recover interest due to him, though there were other mortgagees unsatisfied. The lien given by 53 Geo. III. c. xx. s. 10, is only an additional security, and does not interfere with the right of action.

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(PARKE, J. : The lien is upon the rates and sums of money to be taken by virtue of the Act. The Company might have other property liable in case the plaintiff should recover in an action.)

*Coltman, contra :*

The cases undoubtedly establish that where a fact is once agreed upon between two parties by their solemn act and acknowledgment under seal, it shall not afterwards be called in question by either. But an exception must be made if the effect of such estoppel would be the accomplishment of a purpose which the law does not allow. Since the case of *Collins v. Blantern* (1) it has always been held (as, particularly, in *Paxton v. Popham* and *Macarthur* (2),) that an obligor may plead facts inconsistent with what appears on the condition of the bond, to shew that it was given upon an illegal consideration. The question, therefore, in this case, is, whether the Company could legally borrow money under colour of fulfilling the purposes of the Act which authorizes such borrowing, but really for other purposes.

(LORD TENTERDEN, Ch. J. : The plea does not state that. It merely puts the negative, that the money was not borrowed for the purposes of the Act.)

The averment that the plaintiff did not lend, \*nor the Company borrow, the money for the purposes of the Act, as the plaintiff well knew, is sufficiently precise. The material allegation is the negative one, that the money was not raised for the legitimate

[ \*551 ]

(1) 2 Wils. 347.

(2) 9 East, 408.

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purposes. To state the objects for which it was raised would only have been an argumentative denial. Enough appears on the pleas to shew a fraud which will vitiate the bonds. The powers acquired by a Company under such an Act as this, and the terms upon which they are to be exercised, are a bargain between the proprietors and the public: and if the Company violate that bargain to the injury of those who have advanced money, and look to the undertaking for payment, it is, so far, a fraud upon the public.

(LORD TENTERDEN, Ch. J.: It should, then, have been stated or shewn by the pleas that the borrowing was in fraud of those who had previously advanced money on the undertaking.

PARKE, J.: The argument for the defendants must be, that the bonds were illegal unless given in actual re-payment of money advanced. Suppose they had been given by way of securing payment to a person who had to do, or who had done, work under the provisions of the new Act. If the proprietors had given the bonds at once for these purposes, instead of giving them to raise money to be applied to such purposes, it could not have been said to be a fraud upon the Act. And this is not inconsistent with the pleas. To make out fraud, it ought to have been shewn that the bonds were given without consideration, or for a consideration quite beside the purposes of the Act.

LORD TENTERDEN, Ch. J.: Neither fraud nor injury appears by these pleas.)

As to the sixth and eleventh pleas, the Act 53 Geo. III. c. xx. s. 10, puts these bonds upon the same footing with the mortgages mentioned in sects. 2 and 3, \*and clearly expresses the intention that no person shall obtain a preference by the priority of date of any security held by him. This would be defeated, if the bonds could at any time be enforced by action. The effect of the clause is, that all parties holding the bonds or notes there mentioned shall equally have a lien on the rates and monies to be raised, and that shall be their security.

LORD TENTERDEN, Ch. J. :

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I am of opinion that the plaintiff is entitled to judgment on both the points raised by these demurrers. As to the fifth and tenth pleas, I am not prepared to say that the Company might not have been liable upon these bonds, even if they had been given without any view to the purposes expressed by the Act ; but the pleas do not raise that question. If the defendants meant to insist that the bonds were given for purposes unsanctioned by the Act, and also prejudicial to the shareholders and mortgagees, that ought to have been shewn. The pleas, as framed, lay no sufficient ground for the argument of illegality. For that purpose they ought to have gone much farther.

LITLEDALE, J. :

These pleas might have been an answer to the plaintiff's action, if they had shewn that the bonds were given in consideration of some act which was immoral, or contrary to Act of Parliament or public policy ; as in the cases of *Collins v. Blantern* (1) and *Paxton v. Popham* (2), or where defendants have shewn the consideration of a bond to be usurious. So here, if it had appeared that the bonds were given to \*the plaintiff fraudulently and with intent to place in his hands a better security than he was by law entitled to, and that the plaintiff conspired for that purpose with the parties executing the bonds, they would have been bad, and the ground of action would have failed. But this defence does not arise upon the pleas. As to the effect of the tenth section upon the plaintiff's right to recover, it is true that section gives a lien to holders of bonds ; but still the bond is a security of itself, and may be so enforced.

[ \*553 ]

PARKE, J. :

I am also of opinion that the pleas are insufficient. To establish a case of fraud, much more should have been stated. It was for the Company, if they disputed their liability, to open the estoppel arising from their own admissions, by shewing that the consideration of the bonds was illegal, or inconsistent with

(1) 2 Wils. 347.

(2) 9 East, 408.

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the statutes under which they acted; or that there was no consideration. But that would not be so, if, for instance, the Company had given these bonds by way of payment to a person who had executed works for them under the second statute, instead of raising money by bonds for the purpose of paying such person. And this case is not excluded by the fifth and tenth pleas. As to the sixth and eleventh, the lien given by 53 Geo. III. c. xx. s. 10. is an additional security to the holders of bonds, but does not convert the bond into a mortgage.

TAUNTON, J. :

I am of the same opinion as to all the pleas. *Shelley v. Wright* (1) is a clear authority to shew that a party is estopped by his own recital of a particular \*fact in a deed; and although there is an exception where fraud or an illegal purpose can be shewn, the pleas here do not bring the case within it.

*Judgment for the plaintiff.*

1831.  
June 1.  
[ 554 ]

DOE D. WILLIAM KEEN v. MATTHEW WILLIAM  
WALBANK AND SUSAN ARABELLA, HIS WIFE (2).

(2 Barn. & Adol. 554—564; S. C. 9 L. J. K. B. 276.)

A testator devised to trustees and their heirs, certain premises described in his will, upon trust to permit his daughter to enjoy the same, and take the rents during her life exclusively of her husband; and from and after her decease, upon trust to the use of such child or children, and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body; and for default of such issue, to his own right heirs for ever. Then, after devising several other lands to the trustees in the like terms, he concluded thus: "And I hereby will, &c. that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust, or otherwise:" Held, that the trustees took a fee simple in the lands devised to them.

EJECTMENT. At the trial before Littledale, J. at the Spring Assizes for the county of Devon, 1829, a verdict was found for

(1) Willes, 9.  
(2) Referred to by JESSEL, M.R.  
*Collier v. Walters* (1873) L. R. 17 Eq.

252, 258; and see *In re Townsend's Contract*, '95, 1 Ch. 716, 64 L. J. Ch. 334, 72 L. T. 321.

the lessor of the plaintiff, subject to the opinion of this Court on the following case :

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Edward Whitefield, late of Moretonhampstead, in the county of Devon, attorney-at-law, the great grandfather of the lessor of the plaintiff, being before and at the time of his death seised in fee of a messuage called Steward, and several fields and closes called Northmore, Langhills, Pitt Parks, Ditch Parks, Beera, and a messuage in Ford Street, in which the said Edward Whitefield lived at the time of his death, devised (amongst other things) as follows : “ Also I give and bequeath unto Catherine Whitefield, my wife, and her assigns, for and during the term of her natural life, all that my messuage and tenement, with the appurtenances, called Steward, and the fields called Northmore, Pitt Parks, and Ditch Parks, with their appurtenances, and the rents and profits thereof, \*situate in the parish of Moretonhampstead aforesaid ; and from and after the death of my said wife Catherine Whitefield, I give, devise, and bequeath unto Henry Rundle the younger and W. Tozer, and their heirs, all that the said messuage, tenement, fields, and premises last mentioned, with their appurtenances, and the reversions and remainders thereof, and all my estate and interest therein ; to hold to them, their heirs and assigns, upon the trusts and for the purposes following ; *i.e.* upon trust and to the intent that they, my said trustees, shall permit Ann Whitborn, my daughter, to hold the said premises, and take and receive the rents and profits thereof to and for her own use and benefit during her natural life, exclusive of Thomas Whitborn, her husband ; and from and after her decease, upon trust and to the use of such child or children of the body of my said daughter, Ann Whitborn, or of such grandchild or grandchildren of my said daughter, and his, her, or their heirs, and for such estate and estates as she the said Ann Whitborn, notwithstanding her coverture, and whether sole or married, shall by any deed or will which it shall and may be lawful for her to make (her coverture notwithstanding) appoint ; and for want of such appointment, then to the use of the heirs of the body of my said daughter, Ann Whitborn ; and for default of such issue, to my own right heirs for ever.”

[ \*555 ]

The testator then devised to the same trustees and their heirs his houses in Ford Street in Moretonhampstead, and a messuage

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called Willway, and his moiety of Langhills, upon the trusts and for the purposes following; *i.e.* upon trust to permit his daughter, Ann Whitborn, to receive the rents, &c. exclusively, during her life; and \*after her decease, to the use of the children of her body, or of such children or grandchildren as she should by deed or will appoint; and in default of appointment, to the use of the heirs of her body; and in default of such issue, to his own right heirs for ever. Then followed a similar devise to the same trustees and their heirs, of the premises called Beera; but in default of issue of the body of Ann, to the use of W. Tozer, his heirs and assigns, for ever. He then devised to his wife and her assigns for her life, and for one year after her decease, a house in Ford Street, Moretonhampstead, then in his possession, (she permitting his daughter, Ann Whitborn, to live therein, and enjoy part thereof,) and other premises in the will described; and after her decease, he devised the same to the said Henry Rundle the younger and W. Tozer, their heirs and assigns, upon the same trusts as before, and, for want of issue of the body of Ann, to the use of H. Rundle and the heirs of his body, and, in default of such heirs, to the testator's right heirs for ever.

The will concluded with these words: "And I hereby will, order, and direct that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust, or otherwise."

[ \*557 ]

Edward Whitefield, the testator, died in August, 1781, without having altered or revoked his will, leaving the said Catherine his wife, Ann Whitborn his daughter, Thomas Whitborn, Henry Rundle, and William Tozer, him surviving, the said Ann Whitborn being his only child and heiress-at-law. Catherine, the widow, continued \*in possession of the estate called Steward, &c. until the 26th of March, 1791, when she died, leaving the said Ann Whitborn and Thomas Whitborn, her husband, her surviving. Upon her death the said Ann Whitborn was possessed or in receipt of the rents and profits of the said estate called Steward; and she also, immediately, upon the death of her father (the said Edward Whitefield) entered into and was possessed of all the other premises whereof the said Edward Whitefield had

been so seised as aforesaid, until her death on the 30th of August, 1827.

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By indenture, bearing date the 20th of January, 1792, Thomas Whitborn and his wife covenanted to levy a fine as to part of the premises, and to suffer a recovery as to other parts, which were to enure to the use of trustees, their heirs and assigns, upon trust for Ann Whitborn for life; and after her decease, for such persons as she should by will or deed appoint. In the same year a fine was levied and a recovery suffered pursuant to the covenants in that deed.

In 1802 Thomas Whitborn died, leaving Ann Whitborn his wife, and said Ann W. Keen their only child and his heiress-at-law, and Robert Keen her husband, him surviving. The case then stated an appointment made by Ann Whitborn on the 6th of July, 1816, through which appointment the defendants claimed; that in August, 1827, Ann Whitborn died, leaving Ann W. Keen her surviving, who had six children, William Keen, the lessor of the plaintiff, and five daughters. One of these was Susan Arabella Walbank, married to Matthew Walbank; and she and her husband were the defendants in this suit. In May, 1828, the said Ann W. Keen died, leaving her husband Robert Keen, and her said six \*children, her surviving, and leaving the said W. Keen her heir-at-law. The said six children, and the said Matthew William Walbank, are still living.

[ \*558 ]

This case was argued during the last Term (1) by

*Coote* for the plaintiff:

The trustees under the will of Edward Whitefield took only a legal estate *pur autre vie*, that is, during the life of Ann Whitborn. The power given to her to appoint was a legal power, and the remainder over in default of appointment to the use of the heirs of her body was a legal remainder: she was, therefore, equitable tenant for life, with a legal power of appointment, and a legal remainder to the heirs of her body which would not unite with her preceding equitable life estate, so as to give her an estate tail. The power was destroyed by the fine, and the subsequent appointment took no effect; and if that be so, the lessor of the plaintiff,

(1) Before Lord Tenterden, Ch. J., Littledale, Parke, and Patteson, JJ.

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as the eldest son of Mrs. Keen, is now entitled, as tenant in tail, to all the lands devised by his grandfather's will. It is a general rule in the construction of wills, that where there is a devise to trustees for particular purposes, the law will vest the legal estate in them as long as the execution of the trust requires it, and no longer; and as soon as the trusts are satisfied, the legal estate vests in the persons who are beneficially entitled to it: *Jones v. Lord Say and Sele* (1), *Doe d. White v. Simpson* (2), *Doe d. Pratt v. Timins* (3), *Doe d. Woodcock v. Barthrop* (4), *Doe d. Player v. Nicholls* (5), *Hawker v. Hawker* (6). Here the execution of \*the trusts required no more than that the trustees should take the estate during the life of Ann Whitborn. That being so, (and supposing that she did not execute her power of appointment,) on her death the legal estate vested in the lessor of the plaintiff, as legal tenant in tail.

Assuming that the trustees took only an estate *pur autre vie*, the power of appointment reserved to Mrs. Whitborn is destroyed by the fine levied; for the power was a power in gross, and not simply collateral, and might, therefore, be destroyed by the fine. A power simply collateral, *i.e.* a power given to a person who has no estate in the land, and to whom no estate is given, to dispose of the estate in favour of another person, undoubtedly cannot be extinguished by a fine, because it is but an authority and no interest: *Digges's case* (7). But a power in gross, *viz.* one given to a person who had an interest in the estate at the execution of the deed (or other instrument creating the power), or to whom an estate is given by it, but which enables the donee to create such estates only as will not attach on the interest limited to him, may be destroyed by a fine. *Albany's case* (8), *Digges's case* (7), and *Edwards v. Slater* (9), shew that if tenant for life, with a power, levies a fine, all his interest and power are extinguished, and he gains a new estate by wrong. It is true that modern decisions have established that, although a fine alone

(1) 8 Vin. Ab. Devise, C. b. pl. 19.

(2) 5 East, 162.

(3) 1 B. & Ald. 530.

(4) 15 R. R. 530 (5 Taunt. 382).

(5) 25 R. R. 398 (1 B. & C. 336).

(6) 22 R. R. 471 (3 B. & Ald. 537).

(7) 1 Co. Rep. 173.

(8) 1 Co. Rep. 111.

(9) Hardres, 410.

will have the effect of extinguishing a power appendant or in gross, yet, if it appear clearly from the deed leading the uses that the intent was to preserve the power, it will continue : *Tomlinson v. Deighton* (1), *Herring v. Brown* (2), *The Earl of Jersey v. Deane* (3), *Tyrrell v. Marsh* (4). But here no such intent appears, for the deed declaring the uses gave a power to appoint in favour of any person ; whereas the power created by the will was only in favour of children of the body of Ann Whitborn, or grandchildren and their heirs. The intention, therefore, was not to save the power given by the will, but to create an entirely new one.

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*Preston, contra :*

The trustees under the will of Edward Whitefield took the whole legal fee. First, the words “ to them and their heirs ” are sufficiently large to carry the whole inheritance, and must have that effect, unless a contrary intention can be shewn from the other parts of the will : *Doe v. Willan* (5). And the intention of the testator will be best answered by construing the will so as to give the trustees a fee. *Jones v. Lord Say and Sele* (6) was determined on the peculiar expressions used in the will. It was a case *sui generis*. The subsequent cases have undoubtedly established that, under a devise to trustees, they are to take no larger estate than is useful or necessary in order to effectuate the intention of the testator. But here, the purposes of the will require that the trustees should take the fee, for they are to give receipts, pay money, and demise the premises, or any part thereof, as shall be consistent with their duty and trust, or otherwise. Now, as there is no restriction on the direction given to the trustees to demise the land, except that which a court of equity will impose, they must, for that purpose, have the fee, otherwise all the leases must be determinable on the death of Mrs. Whitborn. Besides, the reasoning of BAYLEY, J. in *Doe v. Willan* (5) applies here ; because, as they are to demise for any term they think proper, the true construction of the will is, that they are to create a term out of their interest ; and if so, they must have a reversion after

[ \*561 ]

(1) 10 Mod. 71.

(2) 2 Show. 185.

(3) 5 B. & Ald. 569.

(4) 28 R. R. 577 (3 Bing. 31).

(5) 20 R. R. 355 (2 B. & Ald. 84).

(6) 8 Vin. Ab. Devise, C. b. pl. 19.

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that term ceases. Then, if the trustees took the fee, the lessor of the plaintiff has no title at law; and it will be unnecessary to decide whether the fine destroyed the power. But, supposing even that the trustees took an estate only *pur autre vie*, the power was not extinguished by the fine. There is no authority to shew that such a power of appointment as this, given to a person having only an equitable estate for life, can be so extinguished. It was not an interest in the estate, but only an authority. *Smith v. Death* (1) may perhaps be relied upon on the other side; but that has not been followed up in subsequent cases. The power of appointment here was a power in the abstract; the person who is the object of such a power has the interest, and may release it; but not so the donee of the power. Upon first principles an interest is releasable, but a power in the abstract is not. In *Digges's* case (2) and *Albany's* case (3), the releasor had an interest. Here, too, by the deed to lead the uses, it appears manifestly to have been the intent of the parties to the fine not wholly to destroy the power, but to preserve it (4).

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Coote, in reply :

The direction given by the will of Edward Whitefield to the trustees to demise the land, may be construed as creating a power; and then the leases to be granted by them might take effect out of the power, and not out of the estate. In *Doe v. Willan* (5) it seems to have been conceded that such a clause might, except for the particular expressions in that devise, have been treated either as a trust or a power. In *Doe v. Simpson* (6) the trust was not only for raising an annuity, but for the payment of 800*l.*, and yet it was held not sufficient. It is now clearly settled, that a power in gross may be extinguished, Sugden on Powers, chap. i. sect. 5, 5th ed.

*Cur. adv. vult.*

(1) 21 R. R. 314 (5 Madd. 371).

(2) 1 Co. Rep. 174.

(3) 1 Co. Rep. 111.

(4) Two other points were raised in the case, viz. first, whether, at all events, Mrs. Keen's husband was not tenant by the curtesy; and, secondly, if the power was not destroyed,

whether it was or was not duly executed; but the judgment does not proceed on these points, and it has not been deemed necessary to notice them in the text.

(5) 20 R. R. 355 (2 B. & Ald. 84).

(6) 5 East, 162.

LORD TENTERDEN, Ch. J. now delivered the judgment of the  
COURT :

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This case, which arises upon the will of Edward Whitefield, was argued before us last Term. The first question made was, whether the devisees in trust under that will took the whole legal fee? We are of opinion that they did; and as that defeats the claim of the lessor of the plaintiff in a court of law, it is unnecessary to notice the other points or questions that were discussed at the Bar.

By the will the testator gives to Rundle the younger and Tozer, and their heirs, the tenements in question, and the reversion and remainder thereof, and all his estate and interest therein, to hold to them, their heirs and assigns. These words are sufficient to carry the whole fee, unless it can be clearly collected from \*other parts of the will that the testator intended that the estate given to them should cease at some certain time or event. The trusts are, to permit a married woman to enjoy the premises, and receive the rents for her own separate use during her life; and after her decease, upon trust and to the use of such of her children or grandchildren as she may appoint; and in default of appointment, to the use of the heirs of her body; and for default of such issue, to his own right heirs. This part of the will relates to some particular lands. It is followed by other parts precisely of the same tenor, but relating to other lands; and then concludes thus, "And I hereby will, order, and direct that the trustees and each of them shall, may, and do in every respect give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust or otherwise." Now if leases made in pursuance of this direction would take effect out of the estate of the trustees, they must take the fee; and it was therefore contended for the plaintiff that this direction should be considered as a power, and leases might have effect as an execution of the power. The language of this clause is unlike that of any will by which a leasing power has been given, and it specifies no limit or qualification as to duration, rent; or other matter; but seems evidently intended to authorize any lease that would not be considered in a court of equity as a violation of the duty of a trustee. It is in this respect more large

[ \*563 ]

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[ \*564 ]

and general than the trust contained in the will of Packington Tomkyns, upon which the case of *Doe d. Tomkyns v. Willan* (1) arose, and in which it was held that the trustees took \*the whole fee. It is true that in that case the devise relating to leases was the first clause and trust in the will; but the position of a clause in a will is in itself an immaterial circumstance, because the construction is to be made upon the whole instrument taken together. We consider that case as a direct authority for the present; and it is sufficient to refer to it, and the opinions of the Judges as reported, without repeating them.

The defendant, therefore, is entitled to the *postea*.

*Judgment for defendant.*

1831.  
*June 1.*  
[ 564 ]

DOE ON THE SEVERAL DEMISES OF FREDERICK BOOTH  
AND THOMAS HOUSE v. JOHN FIELD.

(2 Barn. & Adol. 564—570; S. C. 9 L. J. K. B. 274.)

A testator devised all his lands, &c. unto and to the use of trustees, their heirs and assigns for ever, upon trust to pay the rents and profits to the separate use of his eldest daughter for life, and after her decease, upon trust to convey the same to the use of such person, and for such estates, as she by her will should appoint, and in default of such appointment, to the use of her right heirs: Held, that the trustees took an estate in fee simple in the lands devised.

EJECTMENT for a messuage and land in the parish of Mitcham, Surrey. The demises were laid on the 20th of April, 1827. At the trial before Alexander, C. B., at the Spring Assizes for the county of Surrey, 1829, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

The late Harry House of Pall Mall being seised in fee of the premises in question, devised them unto and to the use of William Devaynes and John Leggatt, their heirs and assigns for ever, upon trust to pay, apply, and dispose of the rents, issues, and profits to and for the separate use and benefit of the testator's eldest daughter Dorothy Corner, during her life, separate and apart from John Corner, her then husband, and from any future \*husband, and not subject to the debts or control of such husband,

[ \*565 ]

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and with full power to the said Dorothy Corner, whether covert or sole, and notwithstanding her coverture, to give receipts for the rents, issues, and profits of the said premises, which should be a discharge to the trustees; and from and after the decease of the said Dorothy Corner, upon trust to convey the same to the use of such person and persons, and for such estate and estates, intents and purposes, and in such manner as she, the said Dorothy Corner, by her last will and testament in writing, duly executed, should, whether covert or sole, and notwithstanding her coverture, limit, direct, or appoint; and in default of such limitation, direction, or appointment, to the use of the right heirs of the said Dorothy Corner for ever.

In 1802 the testator died seised of the premises, and thereupon Dorothy Corner, being then married to the said John Corner, entered into the receipt of the rents and profits. In 1803 John Corner, and Dorothy his wife, sold the estate to William Pontifex, but part of the purchase-money was to remain in mortgage on the estate; and in Trinity Term, 1804, a fine with proclamations was levied of the premises by the said John Corner, and Dorothy his wife, with other parties, to Robert Corner; and it was declared by the deed to lead the uses, that the fine should enure to the use of Devaynes and Leggatt (the trustees of the will), and their heirs, subject to redemption by Pontifex. The latter afterwards agreed to sell the estate to Wells Orton; and it having been objected on his part that D. Corner had no power to appoint by deed, but by will only. She, in 1816, being still married, made her will, whereby she gave, devised, limited, directed, and appointed unto and to the use of \*the said Wells Orton the said premises (with others) to hold the same unto the said Wells Orton, his heirs and assigns for ever, and to be conveyed and assured as he or they should direct, limit, or appoint. In the same year Dorothy Corner died without having had any issue, and leaving the said John Corner her husband her surviving.

[ \*566 ]

Leggatt, one of the devisees in trust named in the will of Harry House, disclaimed by deed. Devaynes, the other trustee, died, having first devised all his estates to Booth and two other persons, and they joined in a deed with Orton, and conveyed to

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r.  
FIELD.

the defendant all their estate in the premises mentioned in the will of Harry House. Dorothy Corner was an illegitimate child of the said Harry House. Thomas House, one of the lessors of the plaintiff, was his heir-at-law. Booth, the other lessor of the plaintiff, was the surviving devisee in trust of the real estates of the said W. Devaynes. This case was argued in the last Easter Term (1) by

*Talfourd* for the plaintiff :

The plaintiff can recover only on the demise of House, as Booth, the other of the lessors of the plaintiff, was a party to the conveyance to the defendant. If Dorothy Corner died without having executed the power of appointment given to her by her father's will, the estate of the trustees was at an end (the purposes of the trust being determined), and then the heir-at-law of the testator was entitled. The questions then are, 1st, what was the effect of the fine? 2ndly, if nothing passed by the fine, whether it so operated as to vitiate the subsequent execution of the power by the will? As to the first question, it is \*clear that under the will Mrs. Corner took only an estate for life with a power of disposition by will, and that the appointment otherwise than by will was void. *Doe dem. Thorley v. Thorley* (2) is in point. That was an ejectment by the heir-at-law of John Thorley, who had devised to his wife all his freehold estate during her natural life, "and also at her disposal afterwards, to leave it to whomsoever she pleased." The defendant claimed under a feoffment made by Mary Thorley in her lifetime, and it was held, the disposal of it by the feoffment in her lifetime was void. Here the words are express, that D. Corner is to appoint by her last will and testament. The fine had no operation on the legal estate which was in the trustees; and the only question is, did it operate so as to extinguish the power? because, if it did, then she must be considered as never having executed it, and the premises vest in the heir-at-law of the testator. (He then contended that this was such a power as might be extinguished by a fine, to which point he cited *Digges's* case (3), *Penne v. Peacock* (4), and *King v. Melling* (5).

[ \*567 ]

(1) Before Lord Tenterden, Ch. J.,  
Littledale, Parke, and Patteson, JJ.  
(2) 10 R. R. 352 (10 East, 438).

(3) 1 Co. Rep. 175 a.  
(4) Cases temp. Talb. 41.  
(5) 1 Vent. 225.

*Coote, contra :*

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By this will the trustees took an absolute estate in fee-simple, and Dorothy Corner took an equitable estate for her separate use for life with an equitable power to appoint by will, and an equitable remainder in fee to her own right heirs, which, by the rule in *Shelley's* case, united with her prior estate for life, and gave her the equitable inheritance, which passed by the fine levied by her and her husband to the parties under whom the defendant claims. And a conveyance \*having also been made to the defendant of the legal estate by Booth, (who was the surviving devisee of W. Devaynes, the surviving trustee of Harry House,) the title of the defendant is perfect both at law and in equity. The question as to the extinction of the power by the fine does not arise if Dorothy Corner had only an equitable power of appointment, because the legal estate which was in the trustees is now in the defendant; and to say that Dorothy Corner had an equitable interest for life, with a legal power of appointment, would be cutting down the estate of the trustees to an estate for life. The rule of law undoubtedly is, that an estate will not be raised by implication in trustees beyond what is necessary for the performance of their trusts: *Doe d. White v. Simpson* (1), *Doe d. Woodcock v. Barthrop* (2), *Doe d. Player v. Nicholls* (3), *Doe d. Compere v. Hicks* (4), and that an express estate in fee will be cut down if it be inconsistent with the testator's manifest intention; but this rule has been established in favour of right and in furtherance of the will of testators. Here the trustees, in order to effectuate the intention of the testator, must take an estate in fee, for they could not otherwise convey to such person and for such estate as Dorothy Corner might by her will appoint. Besides, the very words of the devise "unto and to the use of the trustees, their heirs and assigns for ever," amount to an express gift of the fee: *Doe d. Lloyd v. Passingham* (5). Here the plaintiff seeks to strike out of the devise to the trustees the express words "for ever," and to introduce in their stead the words "for the life of Dorothy Corner."

[ \*568 ]

(1) 5 East, 162.

(4) 7 T. R. 433.

(2) 15 B. R. 530 (5 Taunt. 382).

(5) 30 B. R. 327 (6 B. & C. 305).

(3) 25 B. R. 398 (1 B. & C. 336).

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[ \*569 ]

*Penne v. Peacock* (1) \*shews that the trustees have the legal estate, for it was there assumed that the fine operated on the trust estate alone. Secondly, supposing it admitted that the legal estate did not vest absolutely in the trustees, but determinably on the death of Dorothy Corner without executing the power, still the power was well executed; the interest of the appointees has been conveyed to the defendant, and the result is the same. (He then proceeded to contend that the power in this case was not extinguished by the fine, for that, if it was a legal power, it was simply collateral, in which respect this case was distinguishable from *Penne v. Peacock*.)

*Talfourd*, in reply :

The estate, in default of appointment, is to go to the right heirs of Dorothy Corner. If she left heirs the estate would be in them. The trustees, therefore, did not take an absolute fee at all events to them and their heirs, because that was not necessary to enable them to effectuate the testator's intention.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the Court :

In this case, which was argued before us last Term, one of the questions was, whether the devisees in trust under the will of Harry House, on which the case arose, took the fee? it was clear that if they did, the lessor of the plaintiff could not recover; we are of opinion that they did, and it is therefore unnecessary to notice the other points. In this case it is perfectly clear upon reading the will, and without reference to any authorities or decisions, that the trustees must take \*the fee, in order to give effect to all the directions of the will.

The testator gives all his freehold lands, tenements, and hereditaments in the parish of Mitcham, and all his estate, right, title, and interest therein, unto and to the use of William Devaynes and John Leggatt, their heirs and assigns for ever. The effect of those words alone would probably be to give a fee, on the ground that a use cannot be limited on a use, but the declaration of the trusts leaves no room for doubt, for

(1) For. 41; temp. Talb. 41.

these are, upon trust to apply the rents and profits to the separate use of his eldest daughter, a married woman, for her life, and, after her decease, upon trust to convey the same to the use of such persons, and for such estates, as she may appoint; and in default of appointment, to the use of her right heirs. By the very words, therefore, of this will the devisees in trust are, after the death of the testator's daughter, to convey the fee, and this they cannot do unless they take the fee under the will.

The defendant, therefore, is entitled to the *postea*.

*Judgment for the defendant.*

DOE d.  
BOOTH  
v.  
FIELD.

### DRAX v. SCROOPE (1).

(2 Barn. & Adol. 581—584; S. C. 9 L. J. K. B. 291; 1 Dowl. P. C. 69.)

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to the agreement may be allowed on taxation, if the Master, on enquiring into them, considers them proper.

Where such charges had been allowed on taxation and paid, the Court (on application about four months after) refused to order a review of the taxation, it not being shewn that the Master had forbore to exercise his judgment on the charges, in consequence of the agreement between attorney and client.

1831.  
June 2.  
[ 581 ]

A RULE was obtained in Easter Term, calling on an attorney of this Court to shew cause why it should not be referred to the Master to review his taxation of the attorney's bill of costs in the above cause. The bill contained charges for journeys by the attorney and his agent, at the rate of five guineas a day, exclusive of travelling expenses. These were objected to before the Master, as exceeding the usual rate; but it was answered, that the client, soon after he began to employ the attorney, and before the business in question was done, had expressly agreed to a certain scale of charges, comprising those in question. The Master required affidavits in confirmation of this statement; they were made, and others put in in answer; and on consideration of the statements on both sides, and of the objections

(1) It does not appear that there was in this case an agreement in writing such as would now come within the Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4. See now, however, this Act, and the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44).—R. C.

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r.  
SCROOPE.  
[ \*582 ]

to the bill, the Master allowed the charges. The taxation \*was finished in November, 1830, and on the 18th of that month the amount was paid to the attorney, and he paid over a part of it to his agent, who, before the present application was made, went abroad to reside.

*Follett* now shewed cause :

It is not necessary to contend that an agreement like this is binding in ordinary cases, but only that it may be so under special circumstances like the present. In 1 Tidd's Practice, 333, 9th ed. it is laid down that an attorney's bill may be taxed, though there was a special agreement between him and the client that he should be paid for his time at a certain rate by the day, besides his expenses ; but, of the authorities to which he refers on the subject, one (Sayer on Costs, 321) does not go far enough for the present motion ; and another, an *Anonymous* case from 2 Barnard. K. B. 164, is to the contrary effect. The Court, in every case, will look at the particular circumstances, and will not hold the Master precluded from allowing costs on special agreement, if the circumstances appear to warrant them. Besides, in this case the taxation took place several months ago ; the money was paid, and part of it again paid over by the attorney to his agent, who has gone abroad ; and in 1 Tidd's Pr. 392, it is laid down, that after an attorney's bill " has been settled and paid, and the payment has been long acquiesced under, the Courts will not refer it to be taxed as a matter of course, nor, as it seems, unless a gross error or imposition be pointed out."

*Barstow*, *contrà* :

[ \*583 ] On the merits of the case, as disclosed by the affidavits, this agreement is not such a one as the Master ought to have given effect to, in favour of \*the attorney. But, putting the objection on more general grounds, if an attorney could be allowed to set up a special agreement in the manner here contended for, it would be easy, in almost every case, to preclude a taxation, and the statute on that subject would be altogether defeated. Sayer on Costs, 321, and *Newman v. Payne* (1), cited in 1 Tidd's Pr. 393,

(1) 4 Br. C. C. 350.

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fully bear out the present motion. The *Anonymous* case, 2 Barnard. K. B. 164, is not conclusive the other way, and the agreement there might possibly have been entered into before the Act 2 Geo. II. c. 23, providing for the taxation of attorneys' bills, was passed. In *Walmesley v. Booth* (1), where a client had given a bond to an attorney for the purpose of securing to him a certain remuneration for his services, Lord HARDWICKE directed the Master to enquire what those services had been, and what the attorney ought to be allowed for them, and whether he was entitled to any extraordinary recompense. In *Balme v. Paver* (2) Lord ELDON declared a strong opinion against the right of a solicitor to agree for untaxed costs; and observed, "There is nothing that ought to be guarded against with so much jealousy as the right of the suitors to have their bills of costs taxed." And in *Scougall v. Campbell* (3) the LORD CHANCELLOR again expressed himself to a like effect, and said, "I will not permit it to be intimated that a solicitor will act if his bills are not to be taxed, but will not act if his bills are to be taxed."

LORD TENTERDEN, Ch. J.:

No agreement of this kind, even with reference to journeys, can be absolutely binding; \*the Master must still exercise his judgment as to the propriety of allowing the charges, according to the circumstances laid before him. And if it had appeared in this case that the Master had thought no discretionary power was left him, and that he was precluded by the agreement from entering into the consideration upon which the charges were made, there would have been ground for the present motion. But this is not shewn. And besides, the client comes for relief several months after the money has been paid upon the Master's allocatur, and when the attorney has paid over part of it to his agent, who has left the country. Under these circumstances, without establishing any precedent for other cases, I think the rule ought not to be made absolute.

[ \*584 ]

(1) 2 Atk. 27.

(3) 3 Russ. 545.

(2) 23 R. R. 73 (Jacob, 305).

DRAX  
r.  
SCROOPE.

LITLEDALE, J. :

As a general rule, I think effect ought not to be given to these agreements between attorney and client. But there may be cases in which, from the particular nature of the business to be done, such contracts may be allowable, subject, however, to be looked into by the Master. Here the Master has exercised that authority.

PARKE, J. :

Agreements of this kind should be looked at with great jealousy, but as it does not appear in this case that the Master has not exercised his discretion upon the charges, I think the rule must be discharged.

TAUNTON, J. concurred.

*Rule discharged, without costs.*

1831.  
June 3.

# CASHER v. HOLMES, CLERK TO THE COMMISSIONERS OF ARUNDEL PORT (1).

[ 592 ]

(2 Barn. & Adol. 592—597 ; S. C. 9 L. J. K. B. 280.)

An Act for keeping in repair a harbour, imposed certain duties enumerated in a schedule annexed, on goods exported and imported. In the schedule, under the head "metals," certain specified duties were imposed on copper, brass, pewter, and tin ; and on all other metals not enumerated, for every 10*l.* value 10*d.* : Held, that the latter words did not include gold and silver ; and, therefore, that the commissioners were not entitled to demand for specie or bullion, 10*d.* for every 10*l.* value.

THIS action was brought by the plaintiff to recover from the commissioners of Arundel Port, who were sued in the name of their clerk pursuant to the Act of Parliament hereinafter mentioned, the sum of 750*l.* as money had and received by them to the plaintiff's use. At the trial before Bayley, J. at the Spring Assizes for the county of Sussex, 1830, the learned Judge directed a nonsuit to be entered, giving the plaintiff liberty to move to enter a verdict for the above-mentioned sum. On motion, in

(1) Cited as an authority on the principle of *ejusdem generis* in the judgment delivered by CLEASBY, B. in *Gunnestad v. Price* (1875) L. R. 10 Ex. 65, 70, 44 L. J. Ex. 44, 45.—B. C.

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Easter Term, to enter such verdict, this Court directed a case to be stated, the facts of which were as follows :

In September, 1829, his Majesty's frigate *Druid* arrived off Portsmouth, having on board a quantity of gold and silver in doubloons and dollars, bar gold, bar silver, and plate, which she had conveyed from parts beyond the seas to this country on account of several merchants resident in London, and which amounted in value to 273,091*l.* 8*s.* 5*d.*

The plaintiff was employed by the captain of the *Druid* to convey the above-mentioned gold and silver from Portsmouth to London, and deliver it at the bullion-office in the Bank of England, which is used by merchants as a place of deposit for the precious metals. The plaintiff, having received the gold and silver on board of a sloop belonging to him, called the *Elizabeth*, conveyed it first to Portsmouth, and thence into Little \*Hampton Harbour in the port of Arundel. On his arrival there he transhipped it from the sloop *Elizabeth* into barges, for the purpose of having it conveyed to London by inland navigation. The commissioners of Arundel Port demanded from him the sum of 787*l.* 10*s.* as the dues payable to them on the cargo, by virtue of an Act of the 6 Geo. IV. c. clxx. (1). The plaintiff resisted the demand; whereupon the cargo was seized and detained by the commissioners, and he, in order to relieve it from detention, was obliged to pay the sum demanded, which he did under protest, and afterwards brought the present action against the commissioners to recover it back. The questions for the opinion of the Court were, whether the commissioners were entitled to the sum of 787*l.* 10*s.* as dues payable upon the said cargo by virtue of the Act; or whether the sum of 37*l.* 10*s.*, being one twelfth part of what the usual freight then was from London to the port of Arundel, was all that they were entitled to in respect of the same.

[ \*593 ]

[ \*594 ]

*Sir James Scarlett* for the plaintiff :

The Legislature did not mean to include in the schedule the

(1) It enacts, that from and after the 1st of July, 1825, there shall be paid to the commissioners the several duties contained and set forth in the schedule annexed, for all such goods, wares, articles, matters, or things therein enumerated, which shall be exported or imported, laid on board, landed or

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v.  
HOLMES.

articles of which this cargo consisted. They do not come under the head of "cast metal," for that applies only to metal thrown in a mould; nor of "all other metals not enumerated." It is a thing unknown to impose a duty on the precious metals. It is a good rule of construction that where an Act of Parliament begins with words which describe things or persons of an inferior degree, and concludes with general words, the general words shall not be extended to any thing or person of a higher degree: *Archbishop of Canterbury's case* (1). Here under the head "metals" in the schedule, copper, brass, and tin are specifically enumerated. Then follow the general words, all other metals. According to the rule in the case just cited, gold and silver will not be included in these words. Besides, gold and silver are never designated in Acts of Parliament "metals," but as the precious metals, bullion, or specie. Plated goods are \*specified after the head of "all other metals," and are subjected to the same duty. This shews that discharged out of any ship or vessel in the said port of Arundel; and for all goods not therein enumerated, there shall be paid one twelfth part of what the usual freight is, or shall hereafter be, from London to the port of Arundel. In the schedule the following duties are imposed:

	s.	d.
Copper, New . . . . .	per Cwt.	0 2
Old . . . . .	per Cwt.	0 1
Iron, in Bars or unwrought, &c. . . . .	per Ton	1 0
Ironware of all Descriptions . . . . .	per Cwt.	0 1½
Lead . . . . .	per Cwt.	0 1
Medals . . . . .	Ten Pounds' Value	0 10
Metal, Cast . . . . .	per Ton	1 0
Copper or Brass, unwrought . . . . .	per Cwt.	0 1½
Copper or Brass, wrought . . . . .	per Cwt.	0 0½
Pewter, wrought . . . . .	per Cwt.	0 0½
Old Pewter . . . . .	per Cwt.	0 0½
Tin . . . . .	per Cwt.	0 1
And on all other Metals not enumerated, for every Ten Pounds' Value . . . . .		0 10
Plated Goods . . . . .	Ten Pounds' Value	0 10
Steel and Steel Ware . . . . .	Ten Pounds' Value	0 10
Stones, Paving . . . . .	100 Feet	2 0
Portland, Purbeck, or other Stone used for building, per Ton		1 0
Bolder or Flint Stones . . . . .	per Ton	0 1
Chalk Stones, rough and hewn. . . . .	per Ton	0 2
Great Millstone . . . . .		0 6
Small Millstone . . . . .		0 3
Stone or Stone Work, not otherwise enumerated, 10%. Val.		0 10

(1) 2 Co. Rep. 46 a.

they were not considered as included. The same observation applies to "steel and steel ware." In another part of the schedule, under the head "stones," duties are imposed for flint stones, for chalk stone, rough and hewn, and for stone or stonework not enumerated. Would this last denomination include precious stones?

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HOLMES.

*Thesiger, contra:*

The single question is, whether the commissioners had a right to charge 10*d.* for every 10*l.* value of the cargo; and that depends upon this, whether gold and silver are included in the words "all other metals not enumerated." It is said that gold and silver have a specific denomination in Acts of Parliament, but that denomination is not so appropriated that they cannot be expressed by any other. Gold and silver are clearly metals, and to exclude them would be to prevent the operation of the words "all other metals." It is admitted in the cause that some duty is payable on the cargo, and this disposes of part of the argument on the other side. It is said, however, that the duty is to be only one twelfth part of the usual freight from Arundel to London. But these words apply to goods not enumerated; and surely it is doing more violence to ordinary expression to say that gold and silver are comprehended within the term "goods," than within the term "metals." It is undoubtedly a rule of construction that an Act of Parliament which treats, in the outset, of things or persons of an inferior nature, cannot by subsequent general words be extended to those of a superior. But there is no fixed scale of value for the metals. A scarcity of any one might raise its value to that of the precious metals. There is no certain enumeration of metals of inferior value in the schedule. One hundred weight of copper or brass wrought may be more valuable than 10*l.* worth of gold or silver. The rule as to particular enumeration of inferior things, followed by general words, cannot apply, for what metals are there lower than those enumerated?

[ \*596 ]

LORD TENTERDEN, Ch. J.:

I think the words "all other metals" in this Act of Parliament must be understood in their ordinary and popular sense; and in

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that sense they certainly do not include gold and silver. They are never spoken of in popular language as metals, but as the precious metals. That being so, the commissioners were not entitled to demand 787l. 10s. as dues payable on this cargo, and the plaintiff is entitled to have the verdict entered for 750l.

LITTLEDALE, J. :

Undoubtedly, gold and silver are, strictly speaking, metals ; but as articles of commerce, they are never so spoken of as metals, but are described by name, or as the precious metals. The question is, whether they are included under the word “metals” in the schedule of this Act of Parliament. The articles upon which the duties are imposed are arranged alphabetically, and iron, copper and lead occur before the word “metal,” but the precious metals are not mentioned in the schedule, either before or after that word. Under the head “metal,” the only pure metal (of ordinary occurrence) not before mentioned, is tin ; for brass and pewter are alloys or compound metals. Then after the enumeration of the pure metals, and after the mention of brass and pewter, there follow the words “all other metals \*not enumerated.” I have no doubt that those words do not include gold and silver, but refer to metals *ejusdem generis* with others previously mentioned under the head “metal ;” and the metals *ejusdem generis*, and not already enumerated, can only be compound metals, and what were formerly called semi-metals. The plaintiff, therefore, is entitled to judgment.

[ \*597 ]

PARKE, J. :

The word “metals,” taken in its ordinary sense, does not include the precious metals, and I am of opinion that that word must be understood in its ordinary sense in the schedule of this Act of Parliament. And, according to the rule which has been referred to, I think the general words following the particular enumeration in the schedule, must be taken here as referring to an inferior class of metals, such as bell-metal, Queen’s metal, &c. Besides, it is a good rule of construction that where a charge is to be imposed on the subject, it ought to be done in clear and

unambiguous language, and as, at all events, it is not clear that gold and silver are included in the word "metals," upon that ground, as well as the others mentioned, I should be of opinion that the plaintiff was not bound to pay the sum claimed by the commissioners.

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TAUNTON, J.:

I think that the words "metals not enumerated," mean metals *ejusdem generis* with those previously mentioned, and not the precious metals.

*Judgment for the plaintiff.*

DOE ON THE DEMISES OF YOUNG, AND OF BEALE  
AND WIFE v. SOTHERON AND RAY.

(2 Barn. & Adol. 628—639; S. C. 9 L. J. K. B. 286.)

1831.  
June 6.  
[ 628 ]

Devise to Margaret and Elizabeth, and the survivor of them, their heirs and executors for ever, gives a joint-tenancy in fee, and not estates for life with remainder in fee to the survivor.

A fine was levied of thirty messuages, forty cottages, and four acres of land. In the deed to lead the uses, the premises were described as a piece of ground containing so many feet in length and in breadth; and "all those several messuages, dwelling-houses, tenements, warehouses, shops, coach-houses, and all and singular erections and buildings whatsoever, erected and built upon" the said piece of ground. When the fine was levied there were on the piece of ground two or three cottages and forty-nine dwelling-houses; and there was the same number of each when the ejectment was afterwards brought for the premises on behalf of parties claiming by virtue of the fine:

Held, that as the whole number of buildings claimed did not exceed the number of the messuages and cottages named in the fine, and the intention evidently was that all should pass, the title of the lessors of the plaintiff was well sustained by the fine.

A fine may be levied of a cottage, *eo nomine*, and a messuage will pass by that name.

EJECTMENT for sixty messuages and six cottages, and likewise for an undivided moiety of the same. Demises, March 2nd, 1825. At the trial before Lord Tenterden, Ch. J. a verdict was found for the plaintiff, \*subject to the opinion of this Court upon the following case:

[ \*629 ]

Joseph Lycett, being seised in fee of the premises in question, devised, after charging his estate with certain legacies and

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annuities, as follows: "I give and bequeath all my real and personal estate, of what kind soever, unto my sister Margaret Sockwell, wife of Thomas Sockwell, and Elizabeth Sockwell, daughter of the said Thomas and Margaret, jointly, in trust for the uses above mentioned; and do appoint them executrixes of this my will, and do give them the residue or remainder of all my real and personal estate, to them and the survivor of them, their heirs and executors for ever."

The testator died in 1775, and thereupon Thomas Sockwell and Margaret his wife, and Elizabeth their daughter, took joint possession of the premises. In 1778 Elizabeth Sockwell, in contemplation of a marriage between her and one Henry Barker, which took place in the same year, conveyed her moiety to trustees, to her own use and that of her heirs, until the marriage; and afterwards to the use of herself and her husband during their lives, and that of the survivor of them; and afterwards to the use of the trustees for a term of 1,000 years, on certain trusts which never took effect; and, ultimately, to the use of herself and her said intended husband, their heirs and assigns for ever.

[ \*630 ]

In 1779 Thomas and Margaret Sockwell executed a deed to lead the uses of a fine to be levied by them to Henry Barker, of Margaret Sockwell's moiety of the messuages and cottages whereof she was seised in fee under the will of Joseph Lycett. In the covenant for levying the fine, the premises were described as an undivided \*moiety of and in a piece or parcel of ground situate in the parish of St. Luke, Middlesex, containing in length, from east to west, 720 feet of assize (more or less), and in breadth, from north to south, 250 feet (more or less); "and also of and in all those several messuages, dwelling-houses, tenements, ware-houses, shops, coach-houses, and all and singular erections and buildings whatsoever erected and built, standing and being in or upon the said piece or parcel of ground, or any part thereof (late the estate of the said Joseph Lycett deceased), with the appurtenances." The fine was to enure to the use of such person, and for such estate, and to such intents and purposes, &c. as Margaret Sockwell, notwithstanding her coverture, and whether sole or married, should, by deed or by her will, appoint; and, in default of such appointment, or on the determination of any

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interest thereby created, to the use of the said Margaret Sockwell, her heirs and assigns. The fine was levied in Hilary Term, 1780, of "a moiety of thirty messuages, forty cottages, thirty gardens, and four acres of land, in the parish of St. Luke, Old Street."

In 1786 Margaret Sockwell, by her will, recited to be made in pursuance of the power reserved to her by the indenture of 1779, devised her moiety of the premises therein comprised (subject to certain legacies and other charges) to her son-in-law, the said Henry Barker, his heirs and assigns. Her husband, Thomas Sockwell, was then living. She survived him, and died in 1798.

Elizabeth Barker bore a child in March, 1780, which died very soon after; and she died in April, 1780. The lessors of the plaintiff, John Smith Young and Elizabeth Ann Beale, are co-heirs-at-law of Joseph Lycett, and \*of Margaret Sockwell and Elizabeth Barker, and co-heirs-at-law, *ex parte maternâ*, of the infant child of Henry and Elizabeth Barker.

[ \*631 ]

When Mr. and Mrs. Sockwell took possession of the estate (about 1777), there were sixty dwelling-houses standing. Two or three houses were afterwards built for Mrs. Sockwell, and one other large house was also erected on the site of two that were taken down. On a view taken a little before the trial of the cause there were forty-nine houses in the front and two or three cottages at the back; and there were as many in 1779 and 1780 as at the time of the view.

If, upon this case, the Court were of opinion that the fee simple of the entirety of the premises passed to Henry Barker, a nonsuit was to be entered; if otherwise, the plaintiff was to have a verdict for the whole, or a moiety, as the Court should direct. The case was argued on a former day in this Term.

*Campbell* for the plaintiff:

Nothing passed to Henry Barker, and both moieties vest in the lessors of the plaintiff. If Margaret and Elizabeth Sockwell took, by the will of Joseph Lycett, as joint tenants in fee, it must be admitted that Elizabeth, by the deed of 1778, disposed of her moiety, and the lessors of the plaintiff cannot claim it. But the devise here is to Margaret and Elizabeth and the survivor of them, their heirs and executors for ever. It therefore falls

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[ \*632 ]

within the *dictum* of Lord HARDWICKE in *Stones v. Heurtly* (1), “that in a grant, *habendum* to A. and B. and their heirs, they are joint tenants, but the inheritance is in both; but if the *habendum* \*be to A. and B. and the survivor, and the heirs of such survivor, till the death of one, the inheritance is in abeyance.” The words in the present case are different, but not essentially; “their heirs” cannot mean the heirs of both; it must be meant to signify the heirs of whichever may survive. The words, referring as they do to survivorship, cannot be said to constitute a tenancy in common; but if they did, the same difficulty would arise. In *Vick v. Edwards* (2), where a devise was to two and the survivor of them, and to the heirs of such survivor, in trust to sell, it was considered that the trustees had not the fee, for the remainder in fee could only be vested in the survivor, and it was uncertain which would survive. In the case *In re Harrison* (3) similar words were used; and it was held that no fee vested in the trustees till all but one should be dead (4). If, then, the words of Joseph Lycett’s will are not distinguishable in effect from the words used in these cases, it follows that Margaret and Elizabeth took only estates for life, with a contingent remainder in fee to the survivor; and Elizabeth could not, while both were living, sever and convey the fee simple of her moiety.

\* \* \* \* \*

[ 635 ]

*Follett*, for the defendant, was desired to pass over the first point made on the other side, the Court being of opinion that the will of Joseph Lycett created a joint tenancy in fee.

Then the only real question remaining is, whether the fine was properly levied to pass a moiety in the whole of the property. \* \* \*

[ 636 ]

*Campbell*, in reply. \* \* \*

[ 637 ]

\* \* (LORD TENTERDEN, Ch. J.: There is no repugnance here between the deed and the fine; the deed mentions “all those several messuages, dwelling-houses, tenements, warehouses,

(1) 1 Ves. sen. 165.

(2) 3 P. Wms. 372.

(3) 3 Anst. 836.

(4) See Mr. Butler’s note (78) on Co. Litt. 191 a.

shops, coach-houses, and all and singular erections and buildings whatsoever ;" the fine is of a moiety of thirty messuages and forty cottages. The deed recites no particular number of either. There were, in fact, both dwelling-houses and cottages. I do not see why a dwelling-house should not pass under the name of a cottage.

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TAUNTON, J. : It clearly was the intention that the four acres of land, and whatsoever was built upon them, should pass.)

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

The only point reserved for consideration after the argument in this case was the sufficiency of the fine levied by Thomas Sockwell and Margaret his wife in Hilary Term, 1780.

In the deed to lead the uses of this fine the tenements are thus described. (His Lordship here read the description from the deed, as stated in the beginning of this case.) The fine is of a moiety of thirty messuages, forty cottages, thirty gardens, and four acres of land.

It appears by the case that, at the time of the fine levied, the estate consisted of about four acres of land, on which there were forty-nine houses in front, and two or three cottages at the back. There can be no doubt that the fine was intended to comprise every thing mentioned in the deed, and nothing more ; and although it may be true that, if any particular denomination of property \*mentioned in the deed be wholly left out of the fine, it cannot pass thereby, however manifest the intention may be, yet there is no authority for saying that the deed may not be called in aid to explain the description in the fine, if the description be ambiguous. Now the fact found is, that there was a certain number of dwelling-houses, exceeding the number of messuages mentioned in the fine ; but the whole number of dwelling-houses and cottages mentioned in the case does not exceed the number of messuages and cottages taken together, mentioned in the fine.

[ \*638 ]

A cottage is a small dwelling-house: Cowell's Int. Cotagium (1) ;

(1) Any little house, that hath not four acres of land belonging to it.

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any number of cottages may, therefore, satisfy the allegation of a number of dwelling-houses; and there is not any repugnance in common speech between calling a dwelling-house a messuage in one instrument and a cottage in another. A doubt is to be found in some books whether a fine can be levied of a cottage *eo nomine*. In practice, cottages are frequently mentioned in fines; and in West's Symboleography, part 2, fo. 7 b, it is said, "by the name of a messuage may pass a curtelage, a garden, an orchard, a dove-house, a shop, a mill, as parcel of a house. The like of a cottage, a toft, a chamber, a cellar, &c., yet may they be demanded by their single names." In the Year Book, 8 Hen. VI. p. 3, pl. 6, the demand in dower was of the third part of a garden, and a difference of opinion is reported as to whether a person can have a *præcipe quod reddat* of a garden, croft, or cottage; but, in the result, the writ was held good.

[ \*639 ]

It seems, therefore, to be clear that a fine may be levied of a cottage *eo nomine*; and if that may be done, \*then cottages will answer the fact found in the case as to dwelling-houses, and we ought to hold this fine sufficient to pass the whole property, that the intention may be effected, and not defeated by any legal subtilty.

*Postea to the defendants.*

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[ 639 ]

# REX v. THE INHABITANTS OF BATHWICK.

(2 Barn. & Adol. 639—649; S. C. 9 L. J. M. C. 103.)

Upon a question as to the settlement of Elizabeth, the wife of C., the respondents proved by the testimony of C. his marriage with the pauper in 1829. The appellants in order to prove that that marriage was void, on the ground that he had been married in 1826 to M., B. called the latter, who stated that she in 1826 went with C. before W., a reputed clergyman of the Established Church, in Ireland, who in his private house there read to them the marriage ceremony. A document was also produced, purporting to be W.'s letter of orders signed in 1799 by the then Archbishop of Tuam, which was proved to have been among W.'s papers at the time of his death in July, 1829:

Held, that the certificate of the ordination of W. was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that, the certificate not being the act of any Court.

and not having any relation to the corporate character of the Archbishop, the seal was to be considered the seal of the natural person, and not of the corporation. Had it been of the latter character,

*Quere*, whether it would have been admissible without evidence that it was the proper seal?

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UPON an appeal against an order of two justices, whereby Elizabeth, the wife of William Joliffe Cook, was removed from the parish of Bathwick, in the county of Somerset, to the parish of St. Pancras in the county of Middlesex, the Sessions quashed the order, subject to the opinion of this Court on the following case:

The respondents proved by the testimony of the said William Joliffe Cook, his settlement in St. Pancras, and his marriage with the pauper at Bath in 1829, and he stated her to be now his wife. The appellants insisted that the marriage was void, the said Wm. Joliffe Cook having been previously married in Dublin in 1826, to Mary Byrne; and to prove their case, they called the said Mary, to whose competency the respondents objected. The Court having admitted her evidence, she proved that she, being a Roman Catholic, and \*Cook, being a Protestant, went on the 21st of May, 1826, before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of Cook, and asked him whether he would be her husband, to which question both of them answered, I will; and after the ceremony they returned to the house of Cook's father, whose servant she was, and there secretly cohabited for two months and afterwards. It was proved by parol that Wood was reputed to be a clergyman of the Established Church, and the appellants put in a document purporting to be the letters of orders signed and sealed by William, late Lord Archbishop of Tuam, dated the 18th of October, 1799, whereby the Archbishop certified that he had ordained Wood a priest, and which letters were proved to have been among Wood's papers at the time of his death, in July, 1829. The respondents objected to the admissibility of these letters; but they were admitted by the Court without proof of the handwriting or seal of the Archbishop, as being more than thirty years old.

[ \*640 ]

[It was admitted in argument that the marriage was valid if

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 r.  
 THE INHABI- & priest.]  
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*Cur. adr. rult.*

[ 645 ] LORD TENTERDEN, Ch. J. now delivered the judgment of the  
 COURT :

First, we are of opinion that the witness Mary, assuming her to be the first and lawful wife of W. T. Cook, was a competent witness. \* \* \*

[ 648 ] We are of opinion that the certificate of the ordination of Mr. Wood, by whom the first marriage was celebrated in Ireland, was properly received in evidence. This certificate came from the proper custody. It was produced by the widow of Wood, and was found among his papers at his death. It was dated in 1799, more than thirty years before the time of its production in evidence; and if it had been signed only, there could have been no question as to its admissibility; but, in fact, it was also sealed: and it was contended that this must be considered as the seal of a Court or of a corporation, and therefore not within the rule as to thirty years, but requiring to be proved. It is not necessary to decide whether such a seal be within the rule; it may be argued that it is not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead; or not capable of being accounted for after such a lapse of time, yet the seals of Courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed. We think it not necessary to decide this question, because a certificate of ordination is not the act of any Court; and although an Archbishop is a corporation sole for many purposes, such as those relating to the temporalities of his see, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation.

[ 649 ] The result of this is, that the decision of the Sessions was right, and the rule must be discharged.

*Order of Sessions confirmed.*

## WINTER v. HALDIMAND.

(2 Barn. &amp; Adol. 649—660; S. C. 9 L. J. K. B. 313.)

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June 6.

[ 649 ]

A policy of insurance was effected at and from the river Plate to Canton and back, on specie, &c. shipped in the river Plate, and on the returns thereof, in any description of merchandize, with liberty to declare and value thereafter. The assured chartered a vessel on a voyage from Buenos Ayres, to Canton and back, and they were to pay for the voyage 10,000 dollars in manner following: viz. "In China, all the sums that might be necessary for the payment of the port charges and other incidental expenses, the latter not exceeding 2,000 dollars, and the balance at thirty days after the vessel's return to Buenos Ayres." The underwriters had no notice of the terms of the charter-party. The assured shipped on board this vessel at Buenos Ayres a quantity of specie, consigned to an agent at Canton, who, on the ship's arrival there, advanced to the captain a sum of money, being the amount of the port charges, and a further sum for incidental expenses; and he shipped other goods on board the vessel, on account of his principals, for the homeward voyage. No valuation was ever made in pursuance of the liberty reserved by the policy.

The vessel on her return voyage was lost:

Held, that the assured were not entitled to recover the two sums paid by their agent at Canton, for port charges and other incidental expenses, as part of the value of the merchandize shipped at Canton, and insured by the policy, inasmuch as the money agreed to be paid there was not properly freight, and had no distinct relation to the goods shipped.

*Quere*, whether, upon an open policy, a payment made on the shipment of goods, can, in the event of loss, be added to their price, so as to form part of their value.

THIS case was referred to an arbitrator, who by his award stated the following facts for the opinion of the Court:

The plaintiff is a British merchant residing in London, and is the agent of Don Pedro de Lezica and Don Miguel de Reglas, who at the time of the transactions out of which the cause arose, were merchants residing at and subjects of the state of Buenos Ayres in South America. The plaintiff was authorized by them to effect, and did, in October, 1825, effect in his own name at Lloyd's Coffee House in the city of London, a policy of insurance (in the common form) at and from the river Plate to Canton, during the vessel's stay and trade there, and back to any port or ports, place or places of discharge \*in the river Plate, on specie, &c. shipped in the *Leonidas* in the river Plate, and on the same or the returns thereof (as interest might appear) in any description of merchandize, with liberty to declare and value thereafter. The defendant was one of the

[ \*650 ]

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underwriters. D. P. de Lezica and D. M. de Reglas, had, in June, 1825, chartered the *Leonidas* for a voyage from Buenos Ayres to Whampoa, and back to Buenos Ayres. It was stipulated that the vessel should not carry any cargo, passengers, or letters, on either of the two voyages, without the approbation of the freighters; and the latter agreed to pay for the voyage 10,000 dollars, in manner following; viz. in China all the sums that might be necessary for the payment of port charges and other incidental expenses, (the latter not exceeding 2,000 dollars,) and the balance at thirty days after the vessel's return to the port of Buenos Ayres. Buenos Ayres is a port in the river Plate; and Whampoa mentioned in the charter-party is the same place as Canton mentioned in the policy of assurance.

D. P. de Lezica and D. M. de Reglas, having so chartered the *Leonidas*, shipped on board her at Buenos Ayres, 48,000 Spanish dollars; and consigned the same to their agent at Canton, for the purpose of being invested in produce, to be returned to them at Buenos Ayres. The ship sailed for and arrived at Canton, and the dollars were delivered to the agent, who paid Bartlett (the captain) 3,154 dollars 60 cents, being the amount of the necessary port charges of the *Leonidas*, paid by Bartlett at Canton, and the further sum of 2,000 dollars for other incidental and necessary expenses. The agent also shipped on board the said vessel 1,567 chests of tea for D. P. de Lezica and D. M. de Reglas, and consigned \*the same to them at Buenos Ayres. The money paid for the tea, with the expenses of shipping, amounted to 42,845 dollars and 40 cents. The *Leonidas* sailed from Canton on her return to Buenos Ayres with the chests of tea on board; and in the course of that voyage was captured by a ship belonging to the Emperor of Brazil (who was then at war with the state of Buenos Ayres), and carried into Rio de Janeiro, a port belonging to the Emperor. By this capture, and by the result of proceedings afterwards taken in the competent Courts at Rio de Janeiro, the cargo of teas became wholly lost to Don P. de Lezica and Don M. de Reglas. No declaration or valuation was ever made upon the policy of assurance by or on behalf of the plaintiff, or of Don P. de Lezica and Don M. de Reglas.

[ \*651 ]

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Before the commencement of this action the defendant paid the plaintiff 262*l.* 0*s.* 5*d.* in respect of his subscription of 300*l.* to the policy of assurance, (being at the rate of 87*l.* 6*s.* 9*d.* per cent. upon such subscription,) without prejudice to the plaintiff's further right to recover in respect of the two sums paid to the captain at Canton; the payment, so made by the defendant to the plaintiff, being the defendant's proportion of the costs and charges upon all the teas shipped from Canton as aforesaid, independent of what had been there paid to the captain.

By the usage of Lloyd's in matters of insurance, where liberty is given by the policy to declare and value after the insurance is effected, and no declaration or valuation is indorsed on the policy, it is considered as an open policy.

Neither the defendant nor any of the other underwriters had any notice or knowledge of the charter-party \*above stated, until after the capture had taken place and they were called upon to pay the loss.

[ \*652 ]

The arbitrator awarded that, if the Court should be of opinion that by law the plaintiff was entitled to recover in respect of the 3,154 dollars and 60 cents, and the 2,000 dollars paid at Canton to the captain, then the plaintiff was entitled to claim from the underwriters to the policy the full amount of their respective subscriptions, and to recover from the defendant in this action, 87*l.* 19*s.* 9*d.*: but if the Court should not be of that opinion, then the sum already paid by the defendant was the full amount of his liability, and the plaintiff was not entitled to recover. And upon the whole matter he awarded that the plaintiff was not entitled to recover, and that the defendant should have judgment.

A rule *nisi* having been obtained for setting aside the award, and entering judgment for the plaintiff for the sum of 87*l.* 19*s.* 9*d.*, the Court directed a special case to be stated. The case was argued on a former day in this Term by

*Sir James Scarlett*, for the plaintiff:

The assured are entitled to recover the two sums paid for port charges and other incidental expenses at Canton, as part of the value of the goods there shipped and insured by this policy. It

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will be said that those sums cannot be recovered ; because it is a rule that in an open policy on goods, in case of a loss, the party can recover only the invoice price, and all duties and expenses incurred till they are put on board, together with the premium of insurance. But the principle and foundation of all insurance is indemnity. The object of the contract is to divide among many the loss which would otherwise fall \*upon one. The party insured ought, therefore, to have a complete indemnity, though no profit. Valued policies are sanctioned merely to prevent litigation as to what is the real indemnity. From the principle that a full indemnity, and nothing more, is to be given, results the rule, invariably adopted in case of an open policy, to estimate a total loss, not by any supposed price which the goods might have been deemed worth at the time of the loss, or for which they might have been sold had they reached the market for which they were destined, but according to the prime cost, viz. the invoice price and all expenses incurred till they are put on board. The premium of insurance is allowed to be charged against underwriters in such a case, on the ground that a party being about to send goods on a mercantile adventure is entitled to secure himself a full indemnity against any loss that may happen ; and that he would not do, unless to the other charges he were allowed to add the costs of insurance, which are the costs of procuring that indemnity. Now, here the plaintiff will not be fully indemnified for the loss of the merchandize which was shipped at Canton, unless he recovers from the underwriters, besides the prime cost and shipping charges, the port charges and other incidental expenses paid at Canton. It must be assumed that the assured could not have hired this ship without engaging to pay certain sums at Canton ; and those sums, if the ship had been lost on the voyage from Canton to Buenos Ayres, could not have been recovered back from the ship-owner. Then, to give the assured a full indemnity, they must be allowed to insure those sums.

[ \*654 ]

(LORD TENTERDEN, Ch. J. : They might have insured them as money paid for shipment of goods to be transported to Buenos Ayres ; but they have \*merely effected a policy on merchandize.)

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Those sums constitute part of the value of the goods shipped at Canton. It is not unusual, on shipments of goods in London, that part of the freight should be paid here in advance, and when it is so paid, it is considered in practice as part of the value of the goods. In *Stevens on Average*, p. 53, it is said, that "when the average is adjusted at the port of loading, and the freight has been paid there, the practice is to add it to the value of the cargo, in the same manner as any other charge incurred on the goods before putting them on board the ship: for the merchant has then an interest in the freight, by its being converted into a charge on his goods." The value of the goods is the amount of all the costs of producing them, whether those costs be calculated in labour or money. If an insurance were effected on so many tons of oil (obtained by labour only) in the whale fishery, in case of loss the value must be measured by the value of that quantity of labour which on an average is requisite to obtain such a quantity of oil. So, if the insurance be on goods purchased, the value must be ascertained by adding to the prime cost the shipping charges, premiums of insurance, and such freight as was necessarily payable in order to give the assured an opportunity of shipping the goods on the voyage insured; for if, without first paying that freight, he could not ship the goods, the freight then becomes part of their value.

*Maule, contra:*

By the contract of affreightment, the charterers were to pay for the use of the ship a given sum of money; of which one portion was to be payable on the contingency of the vessel's arriving at Canton, \*the other portion on the contingency of her arriving at Buenos Ayres. The charterers were purchasers of the ship for a term; and they would be liable to pay those sums even if they did not load any goods at Canton. The payment of those sums had no relation to the goods. In *Usher v. Noble* (1) it was held, that the standard of calculation for ascertaining the value of an open policy on goods, either in the case of an average or a total loss, was the invoice price at the loading port, including premium of insurance and commission. The general principle,

[ \*655 ]

(1) 11 R. R. 505 (12 East, 639).

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that an insurance is a contract of indemnity, is not disputed ; but there are cases where a perfect and full indemnity cannot be obtained, as where goods insured sustain damage on the voyage, but arrive at the place of destination ; the freight will then become payable : and though, perhaps, the value of the goods, by reason of the damage, may not equal the freight, still the assured cannot claim, in addition to the damage done to the goods, any part of the freight which they have so paid ; and yet in such a case the assured has not a perfect indemnity. The sums paid at Canton cannot be considered as returns of merchandise. *Flint v. Flemyng* (1) shews that a ship-owner may recover, on a policy on freight, in respect of the benefit he would derive from carrying his own goods in his own ship. If that be so, he cannot recover the value of that benefit on a policy on goods. Suppose the party here had bought the ship, to be paid for at Canton, no part of the price paid for it could have been claimed by the assured as part of the value of the goods. Or, suppose it had been his own ship, and that it had been necessary to repair her in order to bring \*home the cargo ; the expense of those repairs would not constitute any part of the value of the goods. Where freight is paid in London on a vessel chartered there on an outward voyage, that freight is not in practice considered part of the value of the goods.

[ \*656 ]

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the Court.

After stating the facts of the case, his Lordship proceeded as follows :

In the argument on behalf of the plaintiff, reference was made to the principle and foundation of all insurance, viz. indemnity ; and it was contended that, to effect that object, and bring the case within the principle, the payment at Canton must be considered as part of the value of the goods shipped at that place ; and it was observed, that the charges of shipping and the premium of insurance are, even in open policies, considered as part of the value of the goods ; and further, that the freight also, if paid in advance, was, in practice, considered as part

(1) 35 R. R. 205 (1 B. & Ad. 45).

of their value on a total loss. This latter assertion was denied by the defendant's counsel to be true; and the Court has no means of knowing how the practice may really be, nor is the ascertainment of the practice material in our view of the case.

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Although indemnity is the principle of insurance, yet the contract of insurance is, like other contracts, subject to explanation and construction, regulated in some countries by positive law, in this country by usage; and it will be found that absolute and perfect indemnity is not attained in all circumstances and cases, and under every possible event. One instance, and a familiar one, was mentioned by the defendant's counsel: if goods sustain \*damage on the voyage, but arrive at the place of destination, the freight may become payable, although by reason of the damage the value of the goods may fall short of the amount of freight; but the latter cannot be added to the amount of the damage, and the assured has not a perfect indemnity for his loss.

[ \*657 ]

There can be no doubt that, where the construction of the policy is regulated by the positive law of any country, the indemnity of the assured cannot be extended beyond the limits allowed by the law. In this country, if we should depart from usage and decisions, and, instead of reasoning upon them, should look to abstract principles, we should resolve things into their first elements. Laws and usages vary in different countries on this as on other subjects. In this country many losses are considered as losses by perils of the sea, and recoverable under those words in the policy, which, in France and some other countries, are not recoverable unless the underwriters insure against barratry of the master; and, in some countries, negligence and want of skill are included under the term barratry, which in this country are not so included. See Valin on the *Ordonnance de la Marine*, liv. iii. tit. 6, *Des Assurances*, art. 28. In this country, and probably in some others, the premium of insurance is considered as part of the value of the goods, and recoverable as such. In France, the insurance of the premium is allowed by a particular provision of the *Ordonnance*, ib. art. 20; but this must be effected by some special clause in the policy by which the goods are insured, or the insurance may be by a

WINTER distinct policy. 2 Valin, p. 67, and 1 Emerigon, c. 8, s. 12,  
<sup>r.</sup>  
 HALDIMAND. p. 246. I may observe here, that this part of the twentieth  
 [ \*658 ] article of the Ordonnance, and also the twenty-eighth \*article,  
 are retained in the new Code de Commerce, art. 342, 353.

No case like the present has been found in our books ; nothing of the like nature was quoted from foreign authors ; and, as far as my knowledge of them extends, nothing favourable to the plaintiff can be found in them.

We must therefore look at the terms of the policy, which is the contract in question, and see whether its terms, construed according to any principle recognized by usage in this country, will authorize the plaintiff to charge the defendant with these payments at Canton as part of the value of the merchandize shipped there : there is no other mode in which the defendant can be made answerable for them on this policy ; though we have no doubt that those payments might have been made the subject of a special and distinct insurance.

It is found that the underwriters had no notice of the terms of the charter-party, and therefore they could not know whether the parties interested would engage, as they have done, to treat the payments to be made at Canton as part of what is called the freight, so that the loss thereof would fall upon them if the goods were lost ; or whether they would only engage to advance money at that place, so as to be entitled to reimbursement from the owners of the ship if the goods were lost ; or whether the owners of the ship would be (1) to find the means of making those payments on their own account. And it appears to us to be unreasonable to make the extent of the responsibility of the underwriters depend on the terms of a private contract made by the parties interested, and not upon the general usage and customs of trade.

[ 659 ] The sum of 10,000 dollars is not properly to be called freight, but is the price of the hire of the ship, and would have been payable if the whole 48,000 dollars had been left or otherwise disposed of at Canton, and the ship had returned in ballast, or with passengers instead of merchandize. And if these payments to the amount of 5,154 dollars can be added to the price of the goods shipped in this case, it will be difficult to say that they

(1) *Sic.*

might not have been added to the price of a much less quantity, or a much less valuable cargo.

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In truth, the sums payable to the owners of the ship, or for the use of the ship, have under this charter-party no distinct relation to the goods.

We are, therefore, of opinion that the payments in question cannot, in this particular case, be added to and considered as part of the price of the goods.

Our opinion on this case will have no effect on the question, whether the payment on the shipment of goods can be added to their price, so as to form part of their value in an open policy, if ever that question should arise. Such a payment is not properly freight, but the price of the privilege of putting the goods on board the ship, in order to have the opportunity of their being conveyed to the place of her destination; it relates specially and distinctly to the goods: and where it is constantly made, according to the usage of trade, from and to any particular country, the usage may be supposed to be known to the underwriters, and may be (but we do not say that it will be, or ought to be,) considered as a part of the shipping charges, or at least as so closely analogous thereto as to be governed by the rule that is applicable to those charges, in the construction of the policy.

The consequence of our opinion is, that the rule for setting aside the award and entering a verdict for the plaintiff must be discharged.

[ 660 ]

*Rule discharged.*

COLLIER, GENT. ONE, &C. v. SIR WILLIAM HICKS,  
BART., ROBERT CAPPER, Esq., G. RUSSELL, AND  
E. CASTLE.

1831.  
June 7.  
[ 663 ]

(2 Barn. & Adol. 663—672; S. C. 9 L. J. K. B. 300; 9 L. J. M. C. 138.)

Trespass for assaulting, and turning plaintiff out of a police-office. Plea, that two of the defendants, being justices of the peace, were assembled in a police-office to adjudicate upon an information against A. B. for an offence against a penal statute, and were proceeding to hear and determine the same, when the plaintiff (being an attorney) entered the police-office with the informer, not as his friend or as a spectator, but for the avowed purpose of acting as his attorney and advocate touching the information; and as such attorney and advocate,

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without the leave, and against the will, of the justices, was taking notes of the evidence of a witness then under examination before them, touching the matter of the said information, and was acting and taking a part in the proceedings as an attorney or advocate on behalf of the informer; that the above two defendants stated to the plaintiff, that it was not their practice to suffer any person to appear and take part in any proceedings before them as an attorney or advocate, and requested him to desist from so doing; and although they were willing to permit the plaintiff to remain in the police-office as one of the public, yet that he would not desist from taking a part in the proceedings as such attorney or advocate, but asserted his right to be present, and to take such part, and to act as such attorney and advocate for the informer; and unlawfully, and against the will of the justices, continued in the police-office, taking part and acting as aforesaid, in contempt of the justices; whereupon, by order of the above two defendants, the other defendants turned the plaintiff out of the office:

Held, on demurrer, that this was a good plea, inasmuch as no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission.

[ \*664 ]

TRESPASS for assaulting the plaintiff, and turning him out of a police-office at Cheltenham, in the county of Gloucester. Plea, that on the 3rd of December, 1829, to wit, at, &c., one William Latham appeared before and informed J. C. Esq., one of his Majesty's justices of the peace for the county of Gloucester, that one J. Richings did on the 7th of September \*then last past drive a certain carriage or vehicle, with passengers to be conveyed for hire at separate fares upon a public highway, not having thereon a plate or plates as directed by 7 Geo. IV. c. 33, contrary to the statute in that case made and provided, which imposed a penalty of 20*l.* for the said offence; and that the said J. C. duly issued his summons for the appearance of the said J. Richings, on Tuesday the 8th of December then instant, to answer the said complaint and information; that the summons was served upon the said J. Richings, and that the defendants Sir W. Hicks, Bart. and R. Capper, Esq., two of the justices assigned to keep the peace for the said county of Gloucester, at the said time when, &c., to wit, on the said 8th of December, were duly assembled in the said police-office in the declaration mentioned, together with certain other justices, to hear and adjudicate upon the said information and complaint; that the said J. Richings on that occasion appeared before the defendants Hicks and Capper, and the other justices; and the defendants Hicks and Capper, and the other justices, as such justices, &c., were proceeding to hear and

determine the said information and complaint, and to examine witnesses touching the premises, &c.; and that the plaintiff, being an attorney, entered the police-office with W. Latham the informer, not as a spectator or as the friend of Latham, but for the express and avowed purpose of acting as the attorney and advocate of Latham touching the said information and complaint, for fees or reward to him the plaintiff in that behalf; and the plaintiff, as such attorney and advocate, without the leave or licence, and against the will of the defendants Hicks and Capper, and the other justices, was taking notes of the evidence \*of one W. D., then under examination before them, touching the matter of the said information and complaint, and was acting and taking part in the proceedings in the said police-office touching the said information and complaint, and in the said examination, as attorney or advocate for the informer; that the defendants Hicks and Capper stated to the plaintiff, that it was not their practice to suffer any person to appear and take part in any proceedings before them, as such justices as aforesaid, in the character of an attorney and advocate, and requested and ordered the plaintiff to desist from acting and taking a part in the said proceedings as such attorney or advocate for Latham; and that although they, the defendants, Hicks and Capper, and the other justices, were willing to permit the plaintiff to remain and be present in the police-office as one of the public, yet the plaintiff did not, nor would, on being so requested, desist from acting and taking part in the said proceedings as such attorney or advocate, but absolutely refused so to do, and maintained and asserted his right to be present in the police-office, and to take a part in the said proceedings, and to act as such attorney and advocate for and on the part and behalf of Latham the informer, and unlawfully and against the will of the defendants, Hicks and Capper, and the other justices, continued in the police-office acting and taking part in the said proceedings, as such attorney and advocate as aforesaid, in contempt, &c. of the said defendants and of the other last-mentioned justices, and to the disturbance and violation of due order and decency in the administration of justice, and to the hindrance thereof, whereupon the defendants, Hicks and Capper, ordered the other defendants,

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[ \*666 ]

Russell and Castle, being high constables of \*Cheltenham, to turn the plaintiff out of the police-office, and they, in pursuance of such order, did expel him therefrom into the public street, as they lawfully might. To this plea there was a general demurrer (1).

*Godson* in support of the demurrer :

The question raised in this case is, whether justices of the peace, sitting in a judicial capacity to determine whether an offence has been committed against a penal statute which authorises them to summon the party accused, and witnesses, and to examine into the matter of fact, and to give judgment or sentence for the penalty, subject to an appeal to the Quarter Sessions, are bound by law to permit an attorney or advocate to be present to assist the informer. In *Rex v. Borron* (2) it was held, that an attorney has no right to comment on evidence, or to be present, during the investigation of a charge of felony before a magistrate; and in *Cox v. Coleridge* (3), that the prisoner examined before magistrates on such a charge is not entitled, as of right, to have a person skilled in the law present as an advocate in his behalf, it being a preliminary investigation only, and not conclusive. Those cases do not apply to the present, because this is not the case of a preliminary inquiry, but a trial. *Daubney v. Cooper* (4) shews that the proceeding against a party in a summary manner to recover a penalty given by statute is of a judicial nature, and that the justices before whom such proceeding takes place constitute a Court, at which all persons have a *prima facie* right to be present.

[ 667 ] (LORD TENTERDEN, Ch. J.: That case did not decide that the party had a right to be present in his character of an attorney, but merely as one of the public.

PARKE, J.: In the present case the party himself was before the justices; the plaintiff did not appear, properly speaking, in the character of an attorney, but of an advocate.)

(1) There was another plea, stating the decision turned.

the matter of justification somewhat differently; but the plea above stated involves all the points upon which

(2) 22 R. R. 447 (3 B. & Ald. 432).

(3) 25 R. R. 298 (1 B. & C. 37).

(4) 34 R. R. 377 (10 B. & C. 237).

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The authorities shew that, as the magistrates were exercising a judicial authority, and determining whether an offence had been committed against a penal statute, they constituted an open Court, at which all persons had a right to be present. If the plaintiff, therefore, had a right to be present as one of the public, he surely might take notes of the proceedings with a view to an appeal, if that should afterwards become necessary. It was observed by the LORD CHIEF JUSTICE in *Cox v. Coleridge* (1), that if the accused might have the assistance of an advocate, the same right could not be denied to the accuser. Now there is certainly no authority to shew that a party on trial for an offence before justices of peace is entitled, as of right, to have the assistance of a professional man to act as an advocate; but in point of practice, it is generally allowed in such proceedings. In the superior Courts, where Judges of great legal knowledge preside, an advocate is always allowed to plead, and the right to do so, indeed, can hardly be disputed; and if so, *a fortiori*, the right must equally exist in proceedings before justices of the peace, who, from their want of professional knowledge, cannot be so well able to form a correct judgment on the law or the facts of the cases brought before them. If the \*privilege can be disputed on the hearing of an information before justices, when they constitute an open Court, it would be hard to say how far the right might not also be questioned in other open Courts, even the superior ones.

[ \*668 ]

LORD TENTERDEN, Ch. J. :

The question raised in this case is not whether any person has a right to be present on the trial of an information before a magistrate as long as he conducts himself with decency and propriety, nor whether any one, whether attorney or counsel, or of any other description of persons, may or may not be present and take notes, and quietly give advice to either party: but the question is, whether any one is entitled, without permission of the magistrates, and as a matter of right, to attend and take part in the proceedings as an advocate, by expounding the law, and examining the witnesses. This was undoubtedly an open

(1) 25 R. R. 298 (1 B. &amp; C. 37).

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[ \*669 ]

Court, and the public had a right to be present, as in other Courts; but whether *any* persons, and *who* shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates; who, like other Judges, must have the power to regulate the proceedings of their own Courts. The superior Courts do not allow every person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen admitted to the Bar by the members of one of the Inns of Court. They do not allow attorneys to act as advocates; and in one of them (the Court of Common Pleas), even all gentlemen of the Bar are not allowed to exercise *all* the duties of advocates; but the full privilege of so doing is confined to those who *\*are* of the degree of the coif. So doctors of the civil law are not entitled to act as advocates in the Courts at Westminster, although they may do so by special permission of those Courts. So at the Quarter Sessions, the justices usually require that gentlemen of the Bar only should appear as advocates; but, in remote places, where they do not attend, members of the other branch of the profession are permitted to act as advocates. Persons not in the legal profession are not allowed to practise as advocates in any of these Courts. On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own Courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them. It may be, and is, in some cases, very convenient that magistrates should hear counsel or attorneys as advocates, and allow them, as they frequently do, to expound the law, examine witnesses, and reason on the facts; but it has never been decided that any one can claim, as a right, to act in that capacity, without the consent, and against the will of the magistrates. Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the justices. It may be said, that a denial of this right in proceedings before magistrates, will be a hardship on the parties. I cannot accede to that opinion; on the contrary, I think it may be for the benefit of the parties that such right

should not be admitted. If the informer may, as a matter of right, demand that a professional advocate shall be heard \*for him, though he himself be present, the accused must have the same right. The consequence would be, that the parties would in most cases be put to a heavy and grievous expense. My own opinion is, that, in general, the ends of justice will be sufficiently well attained in these summary proceedings by hearing only the parties themselves and their evidence, without that nicety of discussion, and subtlety of argument, which are likely to be introduced by persons more accustomed to legal questions. For these reasons, I think that the judgment of the Court must be for the defendants.

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[ \*670 ]

LITLEDALE, J. :

I am of the same opinion. Every court of justice has the power of regulating its own proceedings. In the superior Courts in Westminster Hall, when barristers attend, they only are permitted to act as advocates. Perhaps if they did not attend, attorneys might be heard as advocates. There is a difference even in the superior Courts in this respect. In the Common Pleas barristers only of a certain rank and degree are permitted to plead. Here the right claimed is for all persons to attend as advocates. The plaintiff, indeed, is an attorney of one of the superior Courts, but he can derive no right from that character to act as an advocate in a proceeding before a magistrate. It seems to me, as magistrates have a right to regulate their own proceedings, they must, consequently, have authority to decide whether advocates shall or shall not be permitted to plead before them, though in cases of difficulty it may be desirable and advisable that the liberty should be granted. I am therefore of opinion, as to the present case, that the plaintiff had no right to take part in the proceedings, or in the examination of the witness, as \*an advocate, without the permission of the magistrates, and, consequently, that the alleged trespass is well justified.

[ \*671 ]

PARKE, J. :

My opinion in this case is not founded in any degree on that part of the plea wherein it is alleged that the plaintiff was taking

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notes of the evidence of a witness then under examination, but on the other part, where it is stated that he was acting and interfering in the proceedings and in the examination as an attorney or advocate on behalf of the informer, and that the justices told him it was not their practice to suffer any person so to do, and requested him to desist, but were ready to permit him to remain in the police-office as one of the public; that he asserted his right to be present, and to take a part in the proceedings, and to act as such attorney or advocate on behalf of the informer, and that he did, against the will of the justices, continue in the office acting and taking a part in the proceedings, as such attorney or advocate. I am of opinion that, in point of law, this plea is a good justification. It is undoubtedly so, unless it can be made out that all the King's subjects have a right to attend a Court of this description, not merely to act as professional advisers, but to take part in the proceedings in the examination of witnesses, and to act as an advocate usually does. Now, it is impossible to say that *all* the King's subjects have a right to act as professional assistants, in the way in which this plaintiff has claimed to do it, either to the party accusing or accused. All may be present, and either of the parties may have a professional assistant to confer and consult with, but not to interfere in the course of the \*proceedings. No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior Courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them. Here, the plaintiff having insisted upon the right to act as advocate, the defendants were justified in committing the alleged trespass.

[ \*672 ]

TAUNTON, J. :

I am of the same opinion. The decision in this case will not be an authority for saying that a person in a police-office has no right to take notes, but that he has no right to act as an advocate

for an informer in a proceeding on a penal statute, without leave of the justices. On such occasions, they have the same discretion which every other Court has, to regulate their own proceedings. The judgment of the Court must be for the defendants.

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*Judgment for the defendants.*

*Justice* was to have argued for the defendants.

### MOUNTNEY v. WATTON (1).

(2 Barn. & Adol. 673—679; S. C. 9 L. J. K. B. 298.)

1831.  
June 7.  
[ 673 ]

Declaration stated that the defendant intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him. The libel, as set out, was headed "Horse-stealer," and then alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; it then went on to state circumstances of suspicion against the plaintiff, and ultimately that, having obtained permission to go out of the constable's sight, he made his escape, but was retaken and confined in gaol for examination. Innuendo, that the plaintiff was guilty of feloniously stealing a horse.

The defendant pleaded the general issue, and then a justification as to all parts of the libel except the word "horse-stealer," setting out in this latter plea the several circumstances related in the libel:

Held, that as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, the statement of circumstances of suspicion to excuse part of the libel, was no sufficient justification: although *semble*, that where a libel contains propositions that may be separated from each other, one may be justified apart from the rest.

CASE for libel. The declaration stated that the defendant, contriving to injure the plaintiff, and to cause it to be believed that he had been and was guilty of feloniously stealing a horse, composed and published in a newspaper a libel of and concerning the plaintiff, containing the matter following of and concerning him, viz.: "Horse-stealer. Charles Mountney, a native of Derby, was taken into custody in this town on Saturday night on suspicion of having stolen a grey horse, the property of Mr. Thomas Adderley of Stone, Shropshire. Information was given to Mr. Bowdler, solicitor, who happened to be constable for the

(1) See a somewhat similar case in (1889) 23 Q. B. D. 388, 58 L. J. Q. B. modern practice: *Fleming v. Dollar* 548.—R. C.

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[ \*674 ]

night, that such a character was at the 'White Horse,' Frankwell. Mr. B., with Heyward the police officer, went in search of him, and found him asleep in bed. Heyward awoke him, and asked where he left the grey horse? He immediately answered 'Chester;' but on looking round, and observing who put the question, he denied all knowledge of the horse." The libel, as set out in the declaration, went on to state that the plaintiff was afterwards conveyed in custody to a house where he had requested to be lodged; that while there, he was permitted \*by the person in whose charge he was to go into a separate room, for the purpose, as he said, of speaking with one of the family; that he escaped, as was supposed, through the window of that room, and that he was afterwards retaken, and confined in gaol for further examination. To this recital of the libel was added the following innuendo: "Then and there by the said libellous matter intending and meaning that he the said plaintiff had been and was guilty of feloniously stealing a horse."

[ \*675 ]

The defendant pleaded, first, the general issue; and, secondly, as to composing and publishing the supposed libel, "save and except as to the words 'horse-stealer,' part of the said supposed libel," that the grey horse, the property of the said T. A. in the libel named (he the said T. A., then living at S. in Staffordshire), had been supposed to have been feloniously stolen, and that information having been thereupon given to the said W. Bowdler in the supposed libel named, he being a night-constable, &c., that the plaintiff was suspected of having stolen the said horse, and was at a house called the "White Horse," situate in a suburb of the said town, to wit, Frankwell, in the libel mentioned; he B. being such constable, and having reasonable cause to suspect that the said horse had been feloniously stolen, and suspecting the plaintiff to have stolen the same, and one J. Heyward in the supposed libel named, being a police officer for the town and liberties of Shrewsbury, including Frankwell, and also suspecting as aforesaid, went in search of the plaintiff at the said "White Horse," Frankwell, and there found him asleep in bed. The plea went in the same manner through the whole narrative of the libel, as stated in the declaration, and concluded by \*justifying in the usual form, except as in the introductory part of the plea was excepted.

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The plaintiff demurred to this last plea, assigning for causes, that it was pleaded to part only of the libel in the declaration mentioned, whereas the libel was one and not divisible; and also that the plea did not allege any facts which justified the libel as explained by the innuendo in the declaration; and, further, that it contained no answer in fact to the declaration, and that it amounted only to the general issue, &c. Joinder in demurrer.

*R. V. Richards* in support of the demurrer :

There are two questions in this case: First, whether, to a declaration for libel, a justification of part may be pleaded. Secondly, whether, omitting the word "horse-stealer," the declaration in this case, which charges, by innuendo, that the libel conveyed an imputation of felony, be sufficiently answered by a plea setting out mere circumstances of suspicion. As to the first point, *Clarkson v. Lawson* (1) will be referred to on the other side; but it might (if necessary) be questioned, whether the judgment in that case was well founded. The matter justified there was not the libel complained of. If the plaintiff had proved no more than the words which the plea professed to answer, he would have been nonsuited; and the argument used by three of the Judges, that the defendant ought to be allowed to shew by his plea what would exempt him from part of the damages claimed, appears inconsistent with general rules; the true test of a plea being, not whether it goes to mitigate the damages, but whether it denies, or confesses and avoids, \*the matter charged in the declaration. But at all events that case is distinguishable from the present, for the word "horse-stealer" here is essentially connected with the remaining part of the libel, and gives the sting to the whole. The narrative of the libel, if understood (according to the principle laid down in *Woolnoth v. Meadows* (2)) in the sense which ordinary persons would give it, clearly carries on the imputation conveyed in the introductory word. The case is like that of *Lewis v. Clement* (3), where a narrative of proceedings in the Insolvent Debtors' Court was headed "Shameful conduct of an attorney." No attempt was made in that case to

[ \*676 ]

(1) 31 R. R. 418 (6 Bing. 266, 587).

(3) 22 R. R. 530 (3 B. & Ald. 702).

(2) 7 R. B. 742 (5 East, 463).

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give a separate justification of the prefatory words, although that course might as well have been taken there as in this case. Secondly, the words in the body of the libel, taken in their ordinary sense, do import that the plaintiff had been guilty of horse stealing; and the innuendo fixes that meaning upon them. The plea, then, as to this, does not properly confess and avoid. It confesses publication, but does not avoid by justifying to the full extent of the libel; for it only states grounds of suspicion.

*Whateley, contra:*

[ \*677 ]

*Clarkson v. Lawson* (1) is in point, and there is no authority for saying that where an alleged libel is in its nature divisible, one part may not be separately justified. In *Stiles v. Nokes* (2), referred to by TINDAL, Ch. J. in *Clarkson v. Lawson*, it seems to have been the opinion of all the Court, that particular parts of the libel might have been justified, if the parts which the justification was meant to cover had been sufficiently \*distinguished. Where, indeed, the plea professes to answer the declaration as to every part of the libel set out, it may be considered defective if it fail in justifying any matter in which an imputation is conveyed; as in *Johns v. Gittings* (3), where the libel charged the plaintiff with stealing cloth and velvet, and the plea, purporting to be a general answer, justified only as to the stealing of velvet. *Lewis v. Clement* (4), referred to on the other side, is also an instance of this kind. But it is otherwise where the plea only professes to excuse one part of the libel; and although such part may be set out in the declaration as connected with other matter, yet, if it be in its nature separable, it may be treated as forming an independent proposition. Thus, in *Lord C. Churchill v. Hunt* (5), the declaration stated that an accident had happened by the collision of two carriages, which took place without any fault in the plaintiff, but that the defendant published a libel of and concerning such accident, imputing it to misconduct in him. The plea in justification stated that the accident mentioned in the supposed libel, was the same with that referred to in the intro-

(1) 31 R. R. 418 (6 Bing. 266, 587).

(2) 7 East, 493.

(3) Cro. Eliz. 239.

(4) 22 R. R. 530 (3 B. & Ald. 702).

(5) 22 R. R. 807 (1 Chitty, 480; 2 B. & Ald. 685).

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ductory part of the declaration; and it then stated that the said accident happened by two carriages coming together, and by the plaintiff's misconduct. The jury, having found for the defendant on the justification, but for the plaintiff as to a part of the libel not justified (relating to a circumstance connected with the accident), it was contended that the verdict upon the justification was in effect a finding that the defendant had not published a libel concerning the accident mentioned in the declaration, and \*that such accident as there mentioned had not, in fact, occurred, it being described in the pleadings as an accident resulting from a collision of carriages without default in the plaintiff. This Court, however, held that the collision, and the absence of fault in the plaintiff, might be considered as two independent propositions, and that the jury, by finding in favour of the justification, had negatived the last and not the first. In the present declaration, the part which complains of a libel imputing felony may be separated from that which merely sets out a narrative alleging circumstances of suspicion; and the latter may be answered by a distinct justification. The body of the paragraph stated in the declaration charges nothing more than that the plaintiff was arrested for horse-stealing, and that certain grounds appeared for suspecting him of that offence. The innuendo goes farther; but if that be too extensive, the defendant ought not to be prejudiced. It is, in fact, too large.

[ \*678 ]

(LORD TENTERDEN, Ch. J.: That would be a question for the jury on a trial. The words "such a character" must surely refer to the term "horse-stealer.")

LORD TENTERDEN, Ch. J. :

I am of opinion that this plea is not sufficient. The declaration states that the defendant published a libel with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing a horse. If the words of the alleged libel did not amount to a charge of felony, the defendant, on a trial, would have succeeded upon the general issue, and without any justification. But if the words declared upon do impute an actual felony, as the declaration charges, then a justification merely setting out that

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[ \*679 ]

the \*plaintiff was, on certain grounds, suspected of stealing, cannot be any answer. I do not, however, mean to lay it down that where an alleged libel is divisible, one part may not be justified separately from the rest, if a proper justification can be made out.

LITLEDALE, J. :

The gist of the whole matter imputed by this libel is contained in the word "horse-stealer." The rest is a statement of facts, from which the imputation contained in that word is deduced. And the declaration avers, in the beginning, and in conclusion by way of innuendo, that the intention was to impute felony. The justification only states circumstances which induce suspicion, and is, therefore, no sufficient answer. And these circumstances all tend to the one conclusion, which is contained in the word "horse-stealer." In such a case, I think a defendant cannot excuse parts of a libel as grounded on matter of suspicion, unless he can justify that which is the result of the whole.

PARKE, J. :

It is unnecessary in this case to give an opinion whether or not a defendant may justify any distinct part of a libel, though I am rather of opinion that he may. But here it is charged in the declaration that the libel imputed felony to the plaintiff; the defendant confesses that by his plea, and only justifies by alleging circumstances of suspicion. Such a plea is no answer.

TAUNTON, J. concurred.

*Judgment for the plaintiff.*

WHITWORTH *v.* HALL (1).

(2 Barn. &amp; Adol. 695—698; S. C. 9 L. J. K. B. 297.)

1831.  
June 6.

[ 695 ]

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so.

CASE for maliciously, and without probable cause, suing out a commission of bankruptcy against the plaintiff. Plea, not guilty. At the trial before Alexander, C. B., at the Summer Assizes for the county of Derby, 1830, the plaintiff's counsel having stated his \*case, *Goulburn*, Serjt. objected that the action was not maintainable, because it was not averred in the declaration, nor could it be proved, that the commission had been superseded; and he cited *Matthews v. Dickinson* (2), which was a similar action, and in which GIBBS, Ch. J. said, "unless the commission was superseded, the action could not be supported." The learned Judge thought the objection fatal, but refused to nonsuit the plaintiff, on the ground that the defendant ought to have demurred to the declaration; and he made the cause a remanet, to give the bankrupt an opportunity of obtaining a *supersedeas* before the next Assizes.

[ \*696 ]

*Goulburn*, in the following Term, obtained a rule *nisi* for entering a nonsuit.

The *Attorney-General* and *Fynes Clinton* now shewed cause:

The want of an averment, that the commission was superseded, was a good ground of demurrer, and the defendant not having demurred, the learned Judge was right in refusing to nonsuit, and in allowing the bankrupt an opportunity to get the commission superseded.

(PARKE, J.: If the objection was fatal, the learned Judge ought to have nonsuited the plaintiff; for if the case were to

(1) Cited by CLEASBY, B. in *Johnson v. Emerson* (1871) L. R. 6 Ex. 329, 344; 40 L. J. Ex. 201, 209; and followed in *Metropolitan Bank v. Pooley* (H. L. 1884) 10 App. Cas. 210; 54 L. J. Q. B. 449.—R. C. (2) 7 Taunt. 399.

WHITWORTH go down again to trial, proof that the commission had been  
 v.  
 HALL. superseded since the cause last came on would be no answer  
 to the action.)

[ \*697 ]

It must be conceded that, in general, an action for the malicious and unreasonable prosecution of an action by bailable process, or of an indictment, cannot be maintained until the action or indictment so vexatiously \*instituted has been determined in due course of law in favour of the party sued or prosecuted, and that the omission to shew such termination of the former proceeding renders the declaration defective if demurred to, but a distinction may be drawn in the case of maliciously suing out a commission. There it is in the discretion of the LORD CHANCELLOR to determine the proceeding by *supersedeas*, or not, at his pleasure. The validity of a commission may as well be tried in an action of this kind as in one of trespass or trover. At all events, after verdict, it would be presumed to have been proved at the trial that the former prosecution was ended: 1 Wms. Saunders, 228, *n.* 1. In *Matthews v. Dickinson* (1), a *supersedeas* was averred in the declaration, and the question was, whether, being averred, it was duly proved. The *dictum* of GIBBS, Ch. J. in that case is the only authority against the plaintiff.

(LORD TENTERDEN, Ch. J.: That was the opinion of one of the most learned and acute Judges that ever sat in Westminster Hall. An action cannot be supported for maliciously holding to bail without shewing that the proceedings were at an end; and yet the discharge from arrest is in the discretion of the Court. Such a case, therefore, is not distinguishable from the present.

TAUNTON, J.: In *Matthews v. Dickinson* (1), the variance would have been wholly immaterial, if it had not been necessary to shew that the commission had been superseded.)

LORD TENTERDEN, Ch. J.:

If a commission of bankrupt be sued out without any reasonable

(1) 7 Taunt. 399.

or probable \*cause, we must assume that the LORD CHANCELLOR would supersede it. There is no sound distinction as to the point raised in this case, between a malicious prosecution by indictment, or a malicious arrest, and a malicious suing out of a commission of bankrupt. Then, as to the want of the averment in question being cured after verdict; in this case there was no verdict, and the objection was not merely, that the declaration did not contain such an averment, but that if it had been there, it was not capable of proof.

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 [ \*698 ]

LITLEDALE, J. :

There is no distinction between an action for a malicious prosecution by indictment, or for a malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them, it is necessary to shew that the original proceeding which formed the alleged ground of the action is at an end.

PARKE, J. :

It seems to be involved in the proposition, that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for the very existence of the commission would be some evidence of probable cause. The rule for entering a nonsuit must be made absolute.

TAUNTON, J. concurred.

*Rule absolute.*

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## REX v. BUMSTEAD.

(2 Barn. & Adol. 699—705; S. C. nom. *Rex v. Bernstein*, 9 L. J. K. B. 321.)

1831.  
 June 7.  
 [ 699 ]

By charter, the Company of Patten Makers were made a corporation, having a master, two wardens, and twelve assistants, and the Company were to elect yearly one of the two wardens to be master.

By a bye-law afterwards made and agreed to by the whole Company, the master was from thenceforth to be elected by the master, wardens, and assistants for the time being, in a particular mode (not prescribed by the charter) out of two or three meet and sufficient persons, being of the number of the master, wardens, and assistants, and selected by the

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master and wardens. In case of an equality of voices the master was to have a double vote :

Held, that the bye-law was bad, because it extended the number of persons eligible by the charter to the office of master : and (per PARKE, J.) *semble* that it was also bad because the election was required to be in a particular mode not prescribed or sanctioned by the charter.

A RULE had been obtained calling upon the defendant to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to be master of the fellowship of the Patten Makers' Company of the city of London, on the ground that he was not elected to that office by the Company at large as directed by their charter, but by the master, wardens, and assistants only.

By charter of the 2nd of August, 1670, the patten-makers within the cities of London and Westminster, and ten miles thereof, were constituted a body corporate, by the name of "The Master, Wardens, Assistants, and Fellowship of the Company of Patten Makers of the City of London," and there were to be one master, two wardens, and twelve assistants of the Company, to be continued as thereafter mentioned. One Granger was named the first master of the Company, to continue from the date of the charter until the 25th of March, 1671 ; and on the Thursday next before that day, the master, wardens, and assistants of the Company were to elect one of the wardens of the Company thereafter named to the office of master, to continue in that office from the said 25th of March, 1671, until the 25th of March, 1672. J. T. and J. B. were then named to be the first \*two wardens of the Company from the date of the charter until the 25th of March, 1671 ; and on Thursday next before that day, the master, wardens, and assistants of the Company were to meet and elect some other fit person, being one of the assistants of the Company, to be warden of the Company for the year next ensuing, in the place of him who should be chosen master. The charter then ordained, that it should be lawful for the Company of Patten Makers and their successors, for that purpose assembled, yearly on every Thursday next before the 25th day of March for ever thereafter, to elect and choose one of the wardens of the Company to be master for the year then next ensuing, and also at the same time to choose one of the assistants to be warden for

[ \*700 ]

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r.  
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the then next year; and every master and warden so from time to time leaving his and their places of master and wardens respectively at the end of their year, should then instantly become assistant and assistants in the room of him or them that should be so chosen out of the assistants to be master and warden; and that when the master and wardens, or any of them, at any time within one year after they were chosen into their office should die, or be removed from their office (which they might be, for just and reasonable cause,) by the master, wardens, and assistants, it should then be lawful for such and so many of the said master, wardens, and assistants who should be then living, or the greater part of them, at their will and pleasure, to elect one or more of the said wardens or assistants to be master, warden, or wardens of the Company, according to the provisions in the charter before expressed, to exercise such office until the 25th of March next ensuing such their election. \*It then named twelve persons to be assistants for life, if not removed for just cause, and, described their duty; and upon the death or removal of any assistants, the master, wardens, and remaining assistants were authorized to elect as such so many other persons out of the Company as the case should require, to make up the number of assistants. And it empowered the master, wardens, and assistants to make bye-laws for the government of the Company, and of persons exercising the trade, both in matters concerning the trade, and in their offices, functions, &c. concerning the Company.

[ \*701 ]

By a bye-law made by the master, wardens, assistants, and fellowship of the Company on the 27th of October, 1673, it was, amongst other things, ordained, that from thenceforth yearly for ever, the master, wardens, and assistants of the Company should assemble in the forenoon of Thursday before the 25th of March, and should proceed to the election of one master and two wardens for the next ensuing year, in manner following: First, the master and wardens for the time being should agree and present to the assistants there assembled the names in writing of two or three meet or sufficient persons, being of the number of the then present master, wardens, and assistants, which two or three persons should immediately withdraw themselves; after which the said master, wardens, and assistants who remained should,

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BUMSTEAD.

[ \*702 ]

by majority of voices, upon the question put by the present master, or one of the wardens, or by their ink with a pen marked upon paper where their names were, elect and make choice of one of those two or three persons so presented in writing, to be master of the Company for one year thence next following, until another should be elected, chosen, and sworn; and for \*more orderly proceeding, the youngest assistant then present was to give the first voice, or first ink or score with a pen, &c. and so ascending orderly to every other assistant, warden, and master, until every one had given his voice or ink; and in case the voices, &c. should be even in number, then the present master should have a double voice or mark for the final determination of the new master, which person so elected should, upon the 25th of March then next following, take the oath of master, &c.

Since the year 1679 the election of the master had been uniformly made by the master, wardens, and assistants of the Company, in the manner pointed out by the bye-law; and on Thursday, the 24th of March, 1831, the then master and the then wardens of the Company presented to the assistants the names in writing of the defendant and A. Bidpath, as two meet and sufficient persons, (being of the number of the then present master, wardens, and assistants of the Company, and the latter being one of the wardens,) for one of them to be elected to the office of master for the ensuing year; and the majority of the master, wardens, and assistants elected the defendant in the manner and according to the form prescribed by the bye-law.

The *Attorney-General* and *Follett* now shewed cause :

By the charter the right of electing the master is vested in the corporation at large, but they were parties to the bye-law, and thereby delegated their right of election to the master, wardens, and assistants, and *Rex v. Westwood* (1), is an authority to shew that they might do so.

[ \*703 ]

(LORD TENTERDEN, Ch. J. : The charter directs that the \*Company of Patten Makers shall elect one of the wardens to be

(1) 4 B. & C. 781.

master. The bye-law does not require that the master elected shall be one of the last wardens. Is not the effect of the bye-law, therefore, to vary the constitution ?)

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BUMSTEAD.

A bye-law narrowing and restraining the right of election is bad, but here the bye-law extends the number of those who are eligible, and such a bye-law is not inconsistent with any principle, nor is there any authority to shew that it is void. It is true that by this bye-law, the master may be elected from the master, wardens, and assistants, whereas the charter requires that one of the wardens should be elected. But as every master and warden going out of office becomes an assistant, it must have been contemplated, that in course of time, the whole of that body would be composed of persons who had previously served the office of warden. And if that be the case, the person required for the office of master, according to the bye-law, must have all the qualifications required by the charter.

*Curwood, contra*, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

This bye-law is bad, not merely on the ground that it extends the number of those eligible, but also because it varies the constitution of the corporation (as fixed by the charter) in this respect, that if the mode of election pointed out by the charter be pursued, the same person cannot be master for two successive years ; but if that prescribed by the bye-law be adopted, he may. In this case the defendant is not aided by the mode pursued at the particular election in question, for the two persons out of whom the choice was to be made, were not the two wardens, which according to the charter they ought to be.

LITLEDALE, J. :

[ 704 ]

This bye-law appears to me contrary to the charter, because the effect of it is to extend the number of persons eligible.

PARKE, J. :

This is not a case where the corporation at large have, by a bye-law, merely delegated the power of election, which they

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possessed before, to a select body; because here, by the charter, the master is to be elected from particular persons, viz. the two wardens, but by the bye-law he may be elected from among other persons, viz. the master and assistants. If such a bye-law were good, the charter might be wholly defeated. It appears to me, therefore, that the bye-law is invalid altogether on that ground. I think also, that that part of the bye-law which regulates the election is void, because the right to elect is thereby delegated to the select body on condition that they elect in a certain mode, which is not directed or sanctioned by the charter. The select body, therefore, have not the power which was given by the charter to the corporation at large.

TAUNTON, J. :

A corporation have no power to make a bye-law contrary to their constitution. That is one of the first elements of the law of corporations. Then the question is, whether this bye-law be not contrary to the constitution of this Company. I think, as the charter says that the master shall be taken out of a select and limited number of persons, it was not competent to the corporation to enlarge that number, and say that the master should be taken out of any other body. I allow that if a bye-law consist of two parts, \*each part being in itself entire, and capable of being separated from the other, the circumstance of one entire and separate part of that bye-law being bad will not vitiate the other. But here the parts are all blended together and consolidated in one mass, and cannot be separated, so that if the bye-law be bad in part, it must of necessity be bad altogether. The rule must therefore be made absolute.

[ \*705 ]

*Rule absolute.*

THE MASTER, &C. OF THE COMPANY OF APOTHECARIES  
v. BENJAMIN GREENWOOD.

(2 Barn. & Adol. 708—711; S. C. 9 L. J. K. B. 331.)

1881.  
June 8.

[ 708 ]

A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients: Held, that this was a practising by A. as an apothecary within the meaning of 55 Geo. III. c. 194, s. 20.

THIS was an action brought to recover penalties for practising as an apothecary without the certificate required by the statute 55 Geo. III. c. 194, s. 20.

At the trial before Park, J., at the Summer Assizes for the county of York, 1830, the following appeared to be the facts of the case:

The defendant was of the age of twenty-four. He had been resident with his father an apothecary, and also with two other apothecaries, for more than five years in the whole; the latter of them, named Drake, lived at Halifax, and the defendant was assistant to him for two years. His brother, John Brooke Greenwood, was also an apothecary, and resided at Gomersall, eight miles from Halifax, and practised there. On the 25th of October, 1828, the defendant was bound apprentice to his brother by a regular indenture. Upon this the brother took a house and opened a shop at Halifax, and the defendant resided on the premises so taken. The brother, according to his own testimony, went to Halifax several times every week, and was consulted by the defendant about some of the patients; and it appeared that he had visited one family. It was proved that the defendant had visited and given medicine to several patients, some of whom knew him when he was with Drake at Halifax. The defendant never received any thing for his attendances, and his brother was paid for the medicines furnished. Upon this it was objected, that there was no evidence that the defendant had ever practised as an apothecary. The learned Judge directed the jury to \*find a verdict for one penalty of 20*l.*, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

[ \*709 ]

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*Coltman* on a former day in this Term shewed cause :

The question in this case is, whether an apothecary's apprenticeship may, on the faith of that apprenticeship, attend patients in the absence of his master, without being liable to penalties for having acted as an apothecary within the meaning of the 55 Geo. III. c. 194, s. 20 (1). It might, perhaps, have been a question of fact whether the defendant practised as an apprentice or an apothecary. The master surely cannot have a right to disperse his apprentices over the country, and to receive the money for their attendance. The apprentice ought to have his master's instruction in each particular case. This is clearly a case within the mischief contemplated by the Legislature, and also within the words of the penal clause.

*F. Pollock and Cresswell, contra :*

[ \*710 ] The question is, whether the acts done by the defendant in this case amounted to a practising as an apothecary, or whether the defendant did not practise as an assistant merely. Now section 21 enacts, that no apothecary shall be \*allowed to recover any charges unless he shall prove that he was in practice as an apothecary before or on the 5th of August, 1815, or that he has obtained a certificate to practise as apothecary from the master, warden, and Society of Apothecaries. In *Brown v. Robinson* (2), to prove that the plaintiff had practised as an apothecary before the 5th of August, 1815, three witnesses stated that he had attended them as an apothecary before that day, but that during the whole time of such attendance he was an assistant in the house of another apothecary, though they always paid the plaintiff. Lord TENTERDEN, Ch. J. held that to be no proof that he

(1) Section 20 enacts, "That if any person (except such as are then actually practising as such) shall after the 1st day of August, 1815, act or practise as an apothecary in any part of England or Wales, without having obtained such certificate as aforesaid, every person so offending, shall for every such offence, forfeit and pay the sum of 20*l.* ; and if any person (except such as are then

acting as such, and excepting persons who have actually served an apprenticeship as aforesaid,) shall after the said 1st day of August, 1815, act as an assistant to any apothecary, to compound and dispense medicines, without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of 5*l.*"

(2) 1 Car. & P. 264.

practised as an apothecary, and he is reported to have said, that no practice while in the service of another, can be a practising as an apothecary under the Act. In *Rose v. College of Physicians* (1), in error, it was held, that an apothecary who made up and administered medicines without licence or the direction of a physician, but who demanded and took no fee for his advice, did not practise physic within the meaning of the statute 14 & 15 Hen. VIII. c. 5. These authorities shew, that a practising must be for the party's own profit. Here that was not the case. If the acts done by the defendant in this case amount to a practising as an apothecary, every interference of an apprentice with a patient, without consulting his master, even though he be absent, the administering even of a dose of medicine, must be equally so. Here the defendant acted *bonâ fide* as an apprentice. If he were liable for any penalty, it would be for acting as assistant without having obtained a certificate, which is a distinct offence, subjecting the party to a different forfeiture.

LORD TENTERDEN, Ch. J. :

[ 711 ]

If the defendant in this case be not the apothecary, then his brother must be. Now, could the latter maintain an action against patients whom he never saw? We will take time to consider of our judgment.

*Cur. adv. vult.*

The judgment of the COURT was now delivered by

LORD TENTERDEN, Ch. J. who, after stating the facts of the case, proceeded as follows :

It was argued for the defendant, that if he should be considered as practising within the terms of the Act, every apprentice to an apothecary who, in the absence of his master, should give attendance, advice, or medicines, might be so considered. We think, however, that no such consequence will follow.

The Act does not in terms require a practising on the party's own account; and it must be obvious that if a case like the present be not within the Act, a door will be opened whereby the objects of the Act may be evaded, and there may be a practising

(1) 5 Br. P. C. 553, vol. i. 78.

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at several towns under one certificate, and at some of them by persons, under the name and colour of apprenticeship, with little or no benefit to the patients from the skill or knowledge of the person who has obtained the certificate. We think the only safe rule is to confine the practice of apprentices to the residence of their master, whereby the patients may in general have the benefit of his skill. In the present case few of the patients could have that benefit in any degree. We think, therefore, the defendant incurred the penalty of the statute, and consequently the rule must be discharged.

*Rule discharged.*

1831.  
June 10.

GIBBONS v. HOOPER, CLERK.

(2 Barn. & Adol. 734—739; S. C. 9 L. J. K. B. 69.)

[ 734 ]

A beneficed clergyman granted annuities by three several deeds, and (by the same deeds) made them chargeable on his living, which he thereby conveyed in trust for the grantee, for the more effectually raising and enforcing payment of the annuities out of the living: and he also gave as a security for payment of the annuities, three warrants of attorney, with defeasances in the common form, to confess judgment at the suit of the grantee.

On motion to set aside the warrants of attorney, as being a charge upon the living in evasion of the statute 13 Eliz. c. 20; the Court held that this did not appear; that the covenants in the annuity deed for payment of the annuity might be good, though the rest were void, and that payment of the arrears, under these covenants, might well be enforced by the warrants of attorney.

[ \*735 ]

THE defendant had by three indentures, bearing date the 3rd of January, 1818, the 13th of November, 1824, and the 1st of November, 1825, granted to the \*plaintiff three several annuities of 47*l.*, 74*l.* 7*s.*, and 145*l.* 7*s.* 6*d.*, chargeable upon and payable out of the rectory of the parish church of Castle Combe, in the county of Wilts, and the lands and tithes, &c., and had, by the said indentures respectively, granted, bargained, and sold to a trustee the rectory, glebe lands, tithes, &c. for certain terms, if the defendant should so long live, upon trust for the benefit of the plaintiff for more effectually raising and enforcing payment of the annuities: and there were covenants in the said indentures that it should be lawful for the plaintiff and his assigns to take the three several annuities during the defendant's life from and out of the rents, issues, profits, tithes, &c. of the rectory, free

from incumbrances. By way of collateral security for payment of the annuities, the defendant gave three warrants of attorney with defeasances in the common form, to confess judgment at the suit of the plaintiff. Judgments had been entered up on these warrants of attorney, as of Trinity Term, 1818, Michaelmas Term, 1824, and Michaelmas Term, 1825, and a sequestration was thereupon issued against the living. A rule *nisi* having been obtained for setting aside these warrants of attorney, on the ground that they were a charge on the defendant's living, and therefore void within the 13th of Eliz. c. 20 (1),

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*Follett* now shewed cause :

These warrants of attorney are not contrary to the 13th of Eliz. c. 20. There is nothing on the face of them to shew that they were intended to operate as a permanent charge on the benefice. This is not distinguishable from any other case of a clergyman giving a warrant of attorney as a security for a debt which he has already contracted. On judgment \*being entered up on a warrant of attorney so given, sequestration is the ordinary consequence. *Flight v. Salter* (2) is distinguishable. There the warrant of attorney recited the grant of the annuity, and the demise of the rectory, and declared that the warrant of attorney was executed to secure the annuity, and to the intent that a sequestration might be obtained by the grantee, and continued during the continuance of the annuity for better securing the same. Here the sequestration can only be for arrears of the annuity actually become due.

[ \*736 ]

*Campbell and Jardine, contra :*

This case falls within the principle of *Flight v. Salter* (2), and *Kirlew v. Butts* (3). In the latter case there was judgment

(1) See *Shaw v. Pritchard*, 34 R. R. 381 (10 B. & C. 241).

(2) 35 R. R. 413 (1 B. & Ad. 673).

(3) KIRLEW v. BUTTS AND  
ANOTHER.

(2 Barn. & Adol. 736, n.—737, n.;  
S. C. nom. *Curlews v. Butts*, 9  
L. J. K. B. 69.)

The defendant Butts, who was rector

of the parish church of Glemsford in the county of Suffolk, and A. B., his surety, on the 12th of February, 1820, executed a warrant of attorney to confess judgment for 3,000*l.*, reciting that, by an indenture of the same date, Butts, for a pecuniary consideration, had granted to the plaintiff for a term of years, determinable upon lives, an annuity of 300*l.*, charged

1831.

EASTER  
TERM.

[ 736, n. ]

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HOOPER.  
[ \*737 ]

and \*execution for the whole penalty. Here are several instruments executed at the same time, and for one common purpose. They must be treated in a court of law as one

upon and secured by a demise of the rectory; and it was thereby declared, that the plaintiff should hold the judgment upon trust to secure the said annuity, but that no execution should be issued unless the annuity should be in arrear for fourteen days; and that if, and as often as, one year's annuity should be in arrear and not paid for fourteen days after demand made thereof by notice, &c., then execution might be issued against the defendant Butts and his estate for 3,000*l.*, and the sum or sums to be levied should be applied in payment of the arrears of the annuity and costs, and the surplus should be held upon trust to be laid out in the name of the plaintiff in the purchase of 3 per cent. Consolidated Annuities, upon trust to pay the said annuity as it should become due, and subject thereto, upon trust for the defendant Butts, and that the other defendant and his estate should still be liable for the arrears of the annuity, but no execution should be levied against him or his estate, except for the arrears of the annuity from time \*to time. Judgment was accordingly entered up; and in the year 1823, a year's annuity being in arrear more than fourteen days after demand made, a sequestration issued, under which the tithes and property of the living were taken by the sequestrator to an amount greatly exceeding the arrears of this annuity due at the time of the execution. A rule *nisi* had been obtained for setting aside the warrant of attorney, judgment, and execution, as being void by the statute 13 Eliz. c. 20.

[ \*737. n. ]

v. *Leake*, 8 T. R. 411, as shewing that the warrant of attorney was not void: and they distinguished the present case from *Flight v. Salter* (1 B. & Ad. 673 (1)), in which the sequestration was to be obtained before the annuity became payable. Here it was to be a consequence of the non-payment at the appointed time.

*Erskine* and *Manning* supported the rule.

In the same Term, Lord TENTERDEN, Ch. J. delivered the judgment of the COURT. His Lordship, after stating the facts of the case, proceeded as follows:

We are of opinion that the warrant of attorney and judgment ought not to be set aside, but the execution only. The effect of the provision, whereby execution, when a year's annuity shall be in arrear fourteen days after demand made, is to issue for 3,000*l.*, &c. is to make the warrant of attorney an absolute charge on the benefice for the entire sum of 3,000*l.*, and to give a power (if it were available by law) to take the profits of the living until the whole sum should be levied, and to apply the dividends, as far as they might go, in payment of it. We are of opinion, that by law, such a power cannot be allowed. That being so, and all the arrears of the annuity due at the time the execution issued having long since been satisfied, so much of the rule as prays that the execution may be set aside must be made absolute, and the rest discharged.

*Rule accordingly.*

*Gurney, F. Pollock, and W. Lee* shewed cause, and relied upon *Mouys*

(1) 35 R. R. 413.

assurance. Whatever, therefore, affects the validity of one will affect that of all.

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(PARKE, J.: Suppose a bond had been given for payment of the annuity, would it have been a good plea to an action on such bond, that it was given to secure the annuity by means \*of a sequestration ?)

[ \*738 ]

If the warrants of attorney are held good, the object of the statute will be defeated ; for the whole profits of a living may thus, by an indirect mode, be appropriated to the payment of an annuity granted by an instrument which is itself null and void under the statute.

(LORD TENTERDEN, Ch. J.: One security may be bad while the other is good.)

If the deeds are void as charging the benefice, the warrants of attorney are given without any consideration.

(PARKE, J.: The deeds contain covenants for payment of the annuity independent of the charge on the benefice.)

The words of the statute 13 Eliz. c. 20, are, “ that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void.” This is like the case of a bond given for the payment of money on an illegal contract. The one being void, they are both void. Thus a bond given as a security for payment of money on the sale of an office, which sale was void by 5 & 6 Edw. VI. c. 16, s. 3, is itself wholly void : *Lee v. Coleshill* (1).

LORD TENTERDEN, Ch. J. :

I think the present case is different from those which have been referred to on the subject of charging benefices. The deeds which the plaintiff sought to enforce by means of these warrants

(1) Cro. Eliz. 529; S. C. And. 55.

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[ \*739 ]

of attorney were good as grants of annuities, though void so far as they went to charge an ecclesiastical benefice. There is nothing in the defeasances of the warrants of attorney to shew that they were intended to bind the \*living, more than in any other case where a clergyman gives the same security. If we held these void, we must set aside every warrant of attorney given by a clergyman holding a benefice, because its effect may ultimately be a sequestration of the living.

LITLEDALE, J. concurred.

PARKE, J. :

In *Mouys v. Leake* (1), which was recognised and acted upon in *Kerrison v. Cole* (2), it was held, that although the grant of a rent-charge on a benefice might be void, yet a personal covenant in the deed of grant to pay the rent-charge, and a warrant of attorney given as a collateral security, were not therefore invalid. The warrant of attorney in this case did not put the annuity creditor on a different footing from others, any further than as it gave him the means of more speedy execution.

TAUNTON, J. :

It occurred to me at first that this transaction might come within the principle of *Doe d. Mitchinson v. Carter* (3), as an attempt to do by evasion what the law would not allow to be done directly. But I think that does not apply here. The warrants of attorney were, no doubt, intended to secure the arrears of the annuity by such means as might be authorised by a judgment thereupon entered up. An execution against the living is the common and inevitable consequence of such judgment against a beneficed person ; but it does not follow that the warrant of attorney is void merely because it leads to that result.

*Rule discharged.*

(1) 8 T. R. 411.

(2) 8 East, 231.

(3) 4 R. R. 586 (8 T. R. 57, 300).

DOE D. W. PREECE *v.* W. HOWELLS, J. PITTS,  
AND T. ADDIS (1).1831.  
June 11.

[ 744 ]

(2 Barn. &amp; Adol. 744—750; S. C. 9 L. J. K. B. 332.)

A pauper, being in custody for having left his wife and children chargeable to a parish for several years, executed an indenture, reciting "that the present, as well as former parish officers, had expended 174*l.* in maintaining his wife and children, and that he had agreed to convey to the parish officers certain lands, &c.:" and he thereby conveyed the same to trustees for the churchwardens and overseers of the poor and of the inhabitants of the parish, to the intent that the rents and profits might be applied to their use and benefit in aid of the poor rate: Held, that this was a conveyance for the benefit of a charitable use, requiring enrolment pursuant to the statute 9 Geo. II. c. 36, s. 1 (2), and not a conveyance for a "valuable consideration actually paid," within s. 2 of that Act: and that a person who had been a party to the deed conveying the property, was not estopped from taking advantage of this objection.

EJECTMENT for premises in the parish of St. Owen in the city of Hereford, of which parish the defendants were, at the time when this action was brought, the churchwardens and overseers of the poor. The declaration was in the usual form, and the demise was laid on the 3rd of March in the eighth year of Geo. IV. Plea, not guilty. At the trial before Littledale, J., at the Spring Assizes for the county of Hereford, 1831, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:

In and for some time before May, 1813, one Richard Hayes was seised of an estate for life in the premises for the recovery of which this action was brought. He left his family chargeable to the parish of St. Owen for a period of fourteen years, and that parish having disbursed for maintenance, clothes, &c. 174*l.*, and the children still being chargeable, it was resolved, at a meeting of the parishioners in vestry on the 3rd of May, 1813, that a warrant should be obtained for his immediate apprehension, and that it should be proposed to him to grant the parish a lease of the premises in question, towards reimbursing them a part of the expenses incurred; and that in case of his refusal, the law should be put in force against him. Hayes was accordingly

(1) Cited by KAY, J. in *Webster v. Southey* (1837) 36 Ch. D. 9, 22, 56 L. J. Ch. 785, 790.—R. C.

(2) See now the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).—R. C.

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[ \*745 ]

apprehended for deserting his family, and \*being in custody on the 12th of July, 1813, by indenture of that date between him of the one part, and William Preece, the lessor of the plaintiff, and W. Harrison, being churchwardens, and W. Phillips and J. Howells, being overseers of the poor, of the parish of St. Owen, of the other part, reciting that Hayes had some time since run away and left his wife and children, whereby they had become chargeable to the parish, and that the present and former churchwardens and overseers had expended 174*l.* from time to time in maintaining the wife and children of Hayes after he had so run away, and while he had so deserted his family; and that Hayes having been that day apprehended, and in custody for the offence aforesaid, had proposed and agreed absolutely to convey the premises to the said churchwardens and overseers for the term therein mentioned (being all the estate and property he had), in satisfaction of the said demand, on their consenting to his discharge so far as they had power and authority to do so; it was witnessed, that in consideration of the agreement, and of 10*s.*, Hayes did grant, bargain, sell, and demise to W. Preece, W. Harrison, W. Phillips, and John Howells, their executors, &c. the premises which this action of ejectment was brought to recover, to hold to them and the survivor of them, their executors, administrators, and assigns from the date thereof, for the term of sixty years, if Hayes should so long live, in trust for the churchwardens and overseers of the poor, and inhabitants of the parish of St. Owen for the time being, to the intent that the rent and profits might be paid and applied for their use and benefit from time to time in aid of the rate for the relief of the poor. This indenture was not enrolled. The defendants claimed title, and held possession, \*under it. W. Preece, W. Harrison, and W. Phillips were alive at the time of the trial. In pursuance of a resolution of the parishioners in vestry assembled, made on the 2nd of December, 1814, the premises in question were converted into a workhouse for the parish of St. Owen, and were so used, and money was laid out by the parish in repairs thereof. Afterwards (in 1826), Hayes having become seised in fee of certain premises, including those in question, conveyed the whole to the said Wm. Preece,

[ \*746 ]

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the lessor of the plaintiff, his heirs and assigns for ever; and he, by virtue of such conveyance, entered on part of the premises, and continued in possession of that part until a short time before the ejectment was brought. The case was argued on a former day in this Term.

*Russell*, Serjt. for the lessor of the plaintiff:

The deed of the 13th of July, 1813, under which the defendants claim, is void. First, because it is inconsistent with the provisions of the stat. 5 Geo. I. c. 8, which enacts, that the parish officers may, by warrant of two justices, seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands, of any person who has left his wife and children, as the said justices shall direct for and towards the discharge of the parish where such wife and children are living, but makes the churchwardens and overseers accountable to the Sessions for what they receive. By proceedings like the present that check is evaded.

(LORD TENTERDEN, Ch. J.: The parish officers might, before the statute, have taken an assignment of the property of the husband, and there is nothing in the statute to prevent that.)

Secondly, the deed was executed while Hayes was under duress.

(PARKE, J.: His imprisonment was lawful.)

Thirdly, the \*deed is void by the 9 Geo. II. c. 36, s. 1, which enacts, that no land shall in any ways be conveyed to or settled on any person in trust for the benefit of any charitable uses whatsoever, unless, *inter alia*, it be by deed indented, and the same be enrolled in the Court of Chancery within six months; and (s. 3) that all such conveyances, otherwise made, shall be void. Now, here the lands in question were conveyed to trustees, for the parish officers for the time being, to the intent that the profits might be applied for their use and benefit in aid of the rate for the relief of the poor. That was clearly a conveyance in trust for the benefit of a charitable use; and the deed, not having been enrolled, is void. The consideration in this case is

[ \*747 ]

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not "a valuable consideration paid," within the meaning of the exempting clause (s. 2) of the statute.

*Thesiger, contra :*

The lessor of the plaintiff, being a party to this deed, is estopped from saying that it is void: Sheph. Touchstone, 58. And it appears from the case that he in fact accepted and acted upon the conveyance.

(LORD TENTERDEN, Ch. J.: Is there any authority for saying that a party is estopped from shewing that a deed is void in law? (1))

[ \*748 ] This was a good conveyance at common law, and is not prohibited by the 5 Geo. I. c. 8, which merely gives parish officers an additional remedy. Secondly, there was no duress in this case, for that word imports imprisonment without lawful authority (Com. Dig. Pleader, 2 W. 19); or, compulsion by tortious usage while in prison under legal process, 2 Inst. 482. Here \*Hayes, at the time when he executed the conveyance, was in lawful custody by virtue of the stat. 7 Jac. I. c. 4, s. 8. Thirdly, this is not a conveyance for the benefit of a charitable use. The statute 9 Geo. II. c. 36, recites, that gifts of lands in mortmain had been prohibited or restrained by Magna Charta and other laws; but, nevertheless, this public mischief had greatly increased, by many large and improvident alienations made by dying persons or others to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs. It is clear, therefore, that this is a case which is not within the mischief contemplated by the preamble. Indeed, the use to which the lands in question were to be applied, viz. in aid of the poor-rate, is one which the law favours rather than avoids, as appears from *Porter's* case (2), where, speaking of conveyances to inhabitants of parishes and their heirs upon trust to employ the profits to such good uses as defraying the tax of the town, maintaining the poor of the parish, &c. it is

(1) See *Hill v. The Proprietors of the Manchester and Salford Water-works*, ante, p. 656.  
(2) 1 Co. Rep. 24 b.

said that it would be a dishonourable thing to the law of the land to make such good uses void. Assuming it even to be within the enacting part of sect. 1 of 9 Geo. II. c. 86, this is a conveyance made really and *bonâ fide* for a full and valuable consideration actually paid, and therefore within the proviso in sect. 2. But, assuming all or any of the objections to be good, the lessor of the plaintiff is not entitled to recover without a previous demand of possession, because the defendants were in possession by permission of the pauper, under whom the lessor of the plaintiff claims.

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(PARKE, J.: If the deed was originally void by the statute, that will not avail.)

*Russell*, Serjt. in reply:

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A party to a deed is estopped as to facts stated in it, but not from saying that the deed is void in law.

The consideration here, if any, was the maintenance of Hayes's family for fourteen years before the conveyance in 1813, by persons, many of whom probably were no longer inhabitants at the time of the conveyance, and could have no interest in it.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

The point reserved for our consideration was, whether the deed of the 12th of July, 1813, was rendered void by the provisions of the 9 Geo. II. c. 86. We have no doubt that this is not a case within sect. 2 of that statute, which provides that the Act shall not extend to any purchase of any estate, or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bonâ fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion. We think that, in order to bring a case within this section, the consideration must be paid by the person for whose benefit the conveyance is made. Here, the consideration was not paid by the persons

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[ \*750 ]

who benefited by the conveyance, but it had been paid out of poor rates levied upon the persons who resided and paid rates in the parish, during the time when relief was given to the wife and children of Hayes. The doubt we had was, whether this was a case within the meaning of the first section. It certainly is not within the mischief recited in the preamble; but it evidently is within the enacting words, \*for the land is conveyed in trust for the benefit of a charitable use, to the intent that the rents and profits may be applied to the use and benefit of the poor in aid of the poor rate. This deed, therefore, not having been enrolled, is void, and, consequently, the plaintiff is entitled to recover.

*Judgment for the plaintiff.*

1831.  
June 10.

[ 757 ]

# NOVELLI v. ROSSI (1).

(2 Barn. & Adol. 757—765; S. C. 9 L. J. K. B. 307.)

Defendant, in discharge of a debt to plaintiff, indorsed bills to him, which had been drawn and indorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. Plaintiff indorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them, "cancelled by mistake." The bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling; they would otherwise have honoured them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior indorsers for payment, but they refused.

The defendant, who resided abroad, cited the drawers, the intermediate indorsers, and the plaintiff, before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That Court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted

(1) See on similar point, *Castrique v. Imrie* (1870) L. R. 4 H. L. 414, 39 L. J. C. P. 58; *Godard v. Gray* (1870) L. R. 6 Q. B. 139, 40 L. J.

Q. B. 62; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 63 (3). —R. C.

him by the holders, with whom the plaintiff was identified, and, consequently, that the other parties to the bills were discharged.

Held, that the French Courts had mistaken the law of England as to the effect of the cancellation; and that their judgment, though binding on the defendant, did not affect the plaintiff's right to sue in England for the debt in respect of which the bills were given (1).

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ASSUMPSIT against the defendant and Louis Gariel (who was outlawed in this action), for 613*l.* claimed to be due to the plaintiff on the balance of his account with the defendant. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Hilary Term, 1830, a verdict was found for the plaintiff for 613*l.*, subject to the opinion of this Court upon the following case:

The plaintiff was a foreign merchant living at Manchester, and agent there for the defendant and his partner, \*Gariel, who resided, and carried on business as merchants, at Turin. In October, 1825, the defendant, being at Manchester, indorsed and delivered to the plaintiff, in payment for goods, two bills of exchange, dated Lyons, 20th of October, 1825, for 300*l.* and 200*l.* sterling, drawn by Bodin Frères & Co., merchants at Lyons, upon John Marshall, Friday Street, London, payable at three months to the order of the drawers.

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At the time of drawing the bills, Bodin & Co. had written on each of them an address to Messrs. Heath, Son, and Furze in case of need. These latter parties resided in London, and were correspondents of Bodin & Co. The bills had been specially indorsed and delivered by Bodin & Co., to Quizard & Co. of Lyons; they indorsed them over to the defendant and Gariel, and the defendant, by procuration for Gariel, indorsed and delivered them to the plaintiff at Manchester as before mentioned. The plaintiff presented the bills in due course to Marshall, the drawee, who accepted them, payable at the house of Messrs. Glyn & Co. The plaintiff then wrote on the bills an address to Messrs. Gandolfi & Co. in case of need, and indorsed and paid them away. One of the bills came to the hands of Messrs. Jones, Lloyd & Co., bankers, London, the other to those of Messrs. Dorrien, Magens & Co., also bankers in London.

(1) See Dicey, Conflict of Laws, 377. The original head-note has been amended.—F. P.

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[ \*759 ]

On the 23rd of January, 1826, when the bills became due, they were presented by their respective holders to Glyn & Co. for payment, and were respectively marked by a clerk in the banking-house of Glyn & Co. through the acceptances; but immediately afterwards a memorandum was written by him in the margin of each in these terms, "cancelled by mistake;" and the bills were then \*returned to the holders unpaid. It is usual for a person who cancels a bill by mistake, to write on it. Marshall, the acceptor, had no effects in the hands of Glyn & Co. The bills were then presented to Heath, Son, and Furze for payment, who refused, alleging "that they could not interfere, the acceptance being cancelled." One of the partners, who was called, said that they would certainly have paid the bills, but that the cancellation was an irregularity, and they should have required an authority; and the parts of the bills presented to them had not any re-acceptance. Glyn & Co. afterwards obtained the re-acceptance of the bills from John Marshall, and the latter, being applied to for payment, answered, "that as to the bill for 300*l.*, he could not pay it at present; and as to the other bill for 200*l.*, he would pay it to-morrow."

The bills were afterwards, on the same 23rd of January, protested and returned to the plaintiff, who took them up, and having given the defendant due notice of the dishonour, sent them with the protests to Gariel & Co., who sent them back to the prior indorsers, Quizard & Co.; and they applied to Bodin Frères & Co., the drawers, for payment, which was refused.

[ \*760 ]

In March, 1826, Gariel cited before the Tribunal of Commerce at Lyons, Bodin Frères & Co., Quizard & Co., and the present plaintiff, to shew cause as follows: Bodin Frères & Co., why they should not be compelled to put a stop to all demands on the part of the present plaintiff as far as regarded the said bills; or, if not, be condemned to reimburse the present plaintiff, in discharge of Gariel, the amount of the said bills with interest and the costs; and the present plaintiff, to shew cause why, in case the protests should be declared \*irregular, he should not be compelled to become guarantee for Gariel, and cause to cease all opposition on the part of Bodin Frères & Co., and Quizard & Co.,

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under pain of being declared to have forfeited all claim upon Gariel. The plaintiff appeared to the citation.

The Tribunal decided, without any regard to certain exceptions taken by Novelli and Gariel, in which they were pronounced not to have any good ground, and on which they were declared non-suited, that Bodin Brothers & Co., Quizard & Co., and Gariel, were released from all demands; consequently, that the bills in question would remain in Novelli's debit, who was cast in the costs of all parties. And they assigned among other grounds for this decision, that there were no satisfactory reasons for supposing that the laws of England, conformably with those of France, did not oblige the holders of bills of exchange to present them to the persons indicated in case of need; and that, besides, it appeared from the declaration on the protests, that the aforesaid persons would have paid if the acceptance had not been cancelled; and that, in consequence of this very cancelling, Bodin & Co. had sustained an injury.

The present plaintiff appealed from this decision to the Cour Royale at Lyons, and prayed (as he had already done before the inferior Court), that Gariel, Quizard & Co., and Bodin & Co. might be condemned to reimburse him the amount of the bills with interest and costs. He also desired to be admitted to prove, that, by the English law, the holder is not under a necessity of applying to the party to whom a bill is addressed in case of need; and that, by the same law, the erasure of an acceptance only takes effect when it has been the result of an understanding with the holder.

Gariel also prayed that in case the Court should amend that part of the former sentence by which the bills were ordered to remain for Novelli's account, Quizard & Co., and Bodin & Co. might be condemned to guarantee him, Gariel, from any decision that might be made against him in favour of Novelli. Quizard & Co. in like manner prayed that Bodin & Co. might be compelled to guarantee them in case the sentence should be amended, and Bodin & Co. prayed that the appeal might be quashed.

The Cour Royale pronounced a decree, quashing the appeal and ratifying the former sentence. They stated, as grounds of their decision, several considerations resulting from the facts as

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represented to them : and, particularly, that as the bills had come into the hands of the last holders duly accepted, and as it appeared that when the protests were made the acceptances had been cancelled (on which account the bills were dishonoured by the parties named in case of need), and that the re-acceptance was subsequent to the protests, it followed that the bills had been vitiated in the hands of the last holders, since Marshall, the acceptor, could no longer be considered as “the direct, and *in solidum* debtor,” and, therefore, every action against him must be suspended till it was ascertained that he possessed funds belonging to the drawers sufficient to discharge the bills : whereas, if the cancelling had not taken place, proceedings could, and probably would, in the then state of commercial affairs in London (January, 1826), have been adopted against Marshall immediately on the dishonour. The Court went on to observe, “that the cancelling of the acceptances throwing an obstacle in the way. this extraordinary change in the state of the bills \*was evidently to Heath, Son, and Furze, and also to Gandolfi & Co., a reasonable ground for refusing to reimburse the holders, by honouring the signature of the drawers and of one of the indorsers, whose intermediate agents they only were to effect the payment, but solely in case that the holders had preserved the right to exact it.” And the Court was of opinion, that the cancelling, whether accidental or otherwise, operated in the same manner as a granting of time to the acceptor by the holders ; and thus, on general principles of law, precluded them from any remedy against the indorsers or drawers. The Cour Royale also stated, that they considered the circumstances as leading to a presumption, that the holders had in reality been paid the amount of the bills by Glyn & Co., and that the supposed accidental cancelling was a contrivance among the parties in London, in consequence of Marshall’s insolvency, to make Bodin & Co. answerable for the bills, instead of subjecting Glyn & Co. to the loss of their amount. But, at all events, they relied on the consideration before stated. (the legal effect, namely, of the alteration in the acceptances,) as sufficient ground for their decree.

They finally declared, that they had no regard to the proofs offered by Novelli, for which they pronounced him nonsuited,

[ \*762 ]

and assigned as reasons: That the whole transaction in London “was totally unconnected with Novelli, who resides at Manchester, and was only an intermediate indorser, and who, nevertheless, has found himself a principal party in the process before the Court; but that Novelli has to impute to himself the having voluntarily yielded to the action carried on by the indorsers against himself; and that, with respect to Bodin Frères & Co., the act of the holders in London, who \*were his mediate or immediate agents, is now necessarily common to himself, and thus he no longer possesses any rights beyond those of the holders themselves; and that, consequently, the proof offered by him, not being contradictory to any of the facts that have been established in the process, must be considered as wholly irrelevant and inadmissible.”

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[ \*763 ]

An appeal lies from the Cour Royale at Lyons to the Cour de Cassation at Paris, which is in the nature of a court of error, but it did not appear that any appeal was ever lodged there against the above decree.

Under these circumstances, if the defendant's liability to the plaintiff on the bills was to be considered as not discharged, the verdict was to stand for 613*l.*; otherwise a nonsuit to be entered.

*Coltman*, for the plaintiff:

The foreign judgment is no bar to the plaintiff's right to recover in this action. The Court here may examine into the validity of such judgment, and is not bound by it if it appear to have been erroneous. In this case the French Court has assumed, as a ground of its decision, that in England the cancelling of an acceptance by mistake, and by a person having no authority, operates against the holders of the bill in the same manner as if they had given time to the acceptor, and precludes them from recovering against prior indorsers or the drawers. That is clearly a misconception of the English law. Here the Court called upon

*F. Pollock*, for the defendant:

It is not at all clear that the Cour Royale was mistaken as to the English \*law. The defendant here says, in answer to the

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plaintiff's claim, that he has indorsed two bills to the plaintiff for the value, and is not to blame if they have proved unproductive. But for the cancelling, Heath & Co. would have paid them. It is said, that a cancelling by mere mistake and without authority is by the English law of no effect, and *Raper v. Birkbeck* (1) may be cited as an authority to that purpose; but there Lord ELLENBOROUGH seems to admit, that if the indorsers had shewn, in point of fact, that after paying the bill, they would have been subjected to any difficulty in recovering over, by reason of the cancellation, the question as to their liability would have been different. It may be true, that such an accident makes no difference in the rights of the holder of the bill, as against the acceptor; but in the case of an intermediate party it may well be questioned, whether, if such person would be unjustly exposed to the risk of injury by paying the bill, he is, under such circumstances, obliged to do so. If Heath & Co. had taken up these bills, the state of the acceptances would evidently have been a material obstacle to their recovering against Bodin. Besides, the judgment of the Cour Royale is in part founded on a conclusion of fact, which they were at liberty to form from the statements before them, that the bills had actually been paid. They are a court of competent jurisdiction, and have decided the question between these parties.

LORD TENTERDEN, Ch. J. :

[ \*765 ]

It is unfortunate for the defendant, if the law of England compels him to pay \*this debt, while the sentence of the French Court, confirmed on appeal, prevents his recovering the amount from the indorsers and drawers of the bills abroad. But this is the consequence of his own act. Without waiting to ascertain what the judgment of an English Court would be in a proceeding on these bills, he goes at once for relief before a Court in France, where the law of England is misinterpreted, it being considered there that the remedy upon the bills in this country was suspended by the accidental cancelling of the acceptance, and, consequently, the indorsers and drawers discharged. If the defendant had waited the result of an action here, the decision of the French

(1) 13 R. R. 354 (15 East, 17).

Court would then probably have been different. If there is no person in this country from whom the defendant can recover what he is liable to pay in this action, that is certainly a misfortune, but it is one that he has brought upon himself. The verdict for the plaintiff must stand.

NOVELLI  
v.  
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TAYLOR AND ANOTHER, ASSIGNEES OF WALSH, A  
BANKRUPT, v. GREGORY.

(2 Barn. & Adol. 774—776; S. C. 9 L. J. K. B. 329.)

1831.  
June 13.  
[ 774 ]

A verdict was taken for 3,000*l.* subject to an award, to be made by a certain day, as to the amount of damages. The arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged. The Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to. But at the instance of the bail, they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England.

A VERDICT having been taken in this case for 3,000*l.*, subject to a reference as to the amount of damages, the arbitrator accidentally omitted to enlarge the time for making his award; and the day appointed for that purpose having elapsed, and no award being made, a rule was obtained in this Term, calling on the defendant to shew cause why the plaintiff should not be at liberty to enter up judgment and issue \*execution forthwith, unless the defendant should consent to an enlargement of the time; and why the defendant or his attorney should not pay the costs of that application. It appeared by the affidavits of the respective parties that the defendant's attorney had been requested to consent that the time might be enlarged, but refused, except upon certain conditions, one of which was, that the bail should be exonerated; and it was admitted that the object contemplated in preventing the reference from proceeding was to gain time for the bail till the defendant himself (who had left England while the action was depending) should return. It appeared that the defendant had given a promise to this effect, and that a letter had been received from him, dated in the preceding March, in which he requested to be informed of the progress of the cause, engaged to

[ \*775 ]

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relieve those who might be subject to liability on his account, and desired that an answer might be sent to him in Jamaica, to which place he was then proceeding from South America.

*Campbell and Richards* now shewed cause :

*Harper v. Abrahams* (1) is an authority against this application. There a verdict was taken in an action of trover, subject to a reference as to the value of the property. The arbitrator died without having made an award. The parties agreed that another should be substituted; but the defendant afterwards withdrew his consent. The Court of Common Pleas refused a rule for delivering the *postea* to the plaintiff, or inserting the name of the proposed new arbitrator in the order of reference :  
[ \*776 ] and \*they said that the death of the arbitrator without having made an award was an opening of the cause.

(LORD TENTERDEN, Ch. J.: It would not properly be an opening of the cause where nothing but the amount of damages was referred.)

There might have been ground for this application if the reference had gone off by any fault of the defendant; but no blame attaches to him.

*Follett, contra :*

The plaintiffs here have a verdict, only subject to arbitration as to the damages. They are entitled to have judgment and execution to some amount, and ought not to be deprived of that advantage, nor the defendant placed in a better situation than before, by an accidental omission of the arbitrator. In *Woolley v. Kelly* (2), where a verdict had been found for 400*l.*, subject to a reference as to the amount, but the arbitrator, finding that he had advised as counsel in the cause, declined proceeding, and the defendant refused to name another arbitrator, this Court ordered judgment and execution to issue for 400*l.*, unless the defendant would consent to another arbitrator being appointed.

(1) 21 R. R. 732 (4 Moore, 3).

(2) 25 R. R. 312 (1 B. & C. 68).

The COURT were of opinion that the rule should be made absolute, except as to costs: but, referring to the letter above-mentioned, they ordered that no proceedings should be taken for fixing the bail before the end of Michaelmas Term.

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r.  
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*Rule absolute on these terms.*

IN THE MATTER OF ARBITRATION BETWEEN CHURCHER,  
GENT. ONE, &C. AND STRINGER, GENT. ONE, &C.  
(2 Barn. & Adol. 777—778; S. C. 9 L. J. K. B. 318; 1 Dowl. Pr. C. 332.)

1831.  
June 13.  
[ 777 ]

On an award directing payment of money at a certain time, interest, from that time till payment, may be recovered by action, but not by motion for an attachment.

CERTAIN matters in difference between the above parties, were referred to an arbitrator, who awarded that Stringer should pay Churcher a sum of money on the 24th of November, 1830. The money not being paid, (though Churcher attended at the proper time and place to receive it,) a rule *nisi* was obtained on the 21st of January following, for an attachment for non-payment of the sum awarded; and, on cause being shewn, this Court referred it to the Master to ascertain whether or not certain deductions should be made. The Master reported, on the 5th of May, that the whole ought to be paid, which was done on the 9th, but Churcher claimed interest from the time of payment fixed in the award, until the day when the debt was actually discharged; and he received the principal sum without prejudice. A rule was obtained in the present Term, calling upon Stringer to shew cause why an attachment should not issue against him for not paying certain sums in the rule specified, being the interest upon the sum awarded, from the 24th of November to the 21st of January, and from thence to the 9th of May.

Kelly now shewed cause, and admitted that he knew of no decision upon the point, but contended that the rule not being sanctioned either by express authority or by practice, ought not to be granted.

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v.  
STRINGER.  
[ 778 ]

*Hoggins, contra*, being asked by the COURT if he could refer to any authority, said there was none on the precise point, but that in an action brought upon an award, ABBOTT, Ch. J. had held interest to be recoverable from the time of demand: *Marquis of Anglesey v. Chafey* (1); and *Pinhorn v. Tuckington* (2) (where the demand was made at the day and place appointed, as in the present case) was to the same effect: and there appeared no reason why, in case of an award, interest as well as principal should not be recoverable both by attachment and by action.

LORD TENTERDEN, Ch. J.:

In an action brought upon an award, interest may certainly be recovered, and I have myself held so more than once; but I never heard that it could be proceeded for by motion for an attachment. That distinction has always prevailed in practice; interest as well as principal may be recovered in an action, but on motion, the principal only.

The rest of the COURT concurred.

*Kelly* then prayed that the rule might be discharged with costs, but the COURT refused this.

*Rule discharged, without costs.*

1831.  
[ 792 ]

# THE PROPRIETORS OF THE STOURBRIDGE CANAL v. WHEELEY AND OTHERS.

(2 Barn. & Adol. 792—797.)

Where a canal is made pursuant to Act of Parliament, the right of the proprietors to toll is derived entirely from the Act; and is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute: and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the Act.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level, there was no lock whatever.

By the Act of Parliament for making the canal, all persons were to be at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the Company, not exceeding the rates therein mentioned; and, by another clause, the Company were

(1) Manning's Digest, tit. Interest, A. (a), pl. 19.

(2) 3 Camp. 468.

authorised to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:

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Held, that this Act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks.

THIS case was argued in the last Term (1) by *Sir James Scarlett* for the plaintiff, and *Campbell* for the defendants. The facts of the case, the several clauses of the Act of Parliament upon which the question arose, and the arguments urged, are so fully stated and commented on in the judgment delivered by the COURT, that it is deemed unnecessary to notice them here.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. in the course of this Term, delivered the judgment of the COURT:

This case was argued before us in the last Term. It was an action of assumpsit brought by the plaintiffs to recover the sum of 492*l.* 9*s.* as a compensation for the use of a way or passage for boats loaded with coals and other merchandize, along a part of the plaintiffs' canal, made under the powers of the 16 Geo. III. c. 28, an Act of Parliament for making and maintaining the Stourbridge \*Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without passing through any lock. Until recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to

[ \*793 ]

(1) Before Lord Tenterden, Ch. J., Littledale, Parke, and Taunton, JJ.

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demand any thing for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it: if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover any thing.

[ \*794 ]

The canal having been made under the provisions of an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act. This rule is laid down in distinct terms by \*the COURT in the case of *The Hull Dock Company v. La Marche* (1), where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler* (2).

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is clearly and unambiguously given to the plaintiffs by this Act of Parliament; and we think it is not.

The Act of Parliament recites that the proposed canal will be of public utility (p. 732); the Company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty “to navigate upon the canal and collateral cuts with any boats or other vessels” of certain dimensions, “and to use the wharfs and quays for loading and unloading any goods, wares, merchandize, and commodities; and also to use the towing paths with horses for haling and drawing such boats and vessels upon payment of such rates and dues as shall be demanded by the said Company of Proprietors not exceeding

(1) 32 R. R. 337, 342 (8 B. & C. 42, 51).

(2) 1 B. & C. 424.

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the rates before mentioned in the statute" (p. 788). This refers to a previous clause, p. 777, which provides, that in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the Company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, \*and conveyed thereon, such rates and duties as they shall think fit, not exceeding the sum of sixpence for every ton of iron, &c. navigated on any part of the canal, and which shall pass through any one or more of the locks which shall be erected on the said canal. A similar provision is made for the tonnage and wharfage of goods in vessels navigated on the collateral cuts; and a power of bringing an action for arrears or distraining is given to the Company.

[ \*795 ]

Now, it is quite certain that the Company have no right expressly given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or collateral cuts; and it is therefore incumbent upon them to shew that they have a right clearly given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal, p. 788, and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks; and that if individuals have no right to navigate a particular part, the Company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions; one, that those persons who pass the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favour of the Company, the latter is in favour of the public and against the Company, \*and is therefore, according to the rule above laid down, the one which ought to be adopted.

[ \*796 ]

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And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the Company to the rates already given; and it is reasonable to suppose that, by the section, p. 777, which gives the rates as a compensation for the expenses of the proprietors, the Legislature meant to include all the benefit they were to derive from the canal, and not to leave the Company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the Company.

Another section upon which some reliance was placed, was that in page 789, which gives to the owners of adjoining lands the power to use any pleasure boats on the canal, &c. (so as the same do not pass through any lock) without paying any rates or dues for the same, and so as such boat be not used for carrying any goods; and it is argued that the inference arising from the latter part of this clause is, that pleasure boats carrying goods would be liable to pay rates, though they should pass no locks; and if pleasure boats, then all other boats should be equally liable. And there is no doubt but that this provision does afford some colour for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure boats; (and in that respect it is introduced *pro \*majore cautela*;) and partly to prevent the Company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure-boats with goods on board, on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is clear the Legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

[ \*797 ]

Upon the principle of construction, therefore, above laid down, viz., that the Company are entitled to impose no burthen on the

public for their own benefit except that which is clearly given by the Act, we are of opinion that, as their right to claim this compensation is not clearly given by the Act, the plaintiffs are not entitled to recover.

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*Judgment for defendants.*

### KENT v. SHUCKARD (1).

(2 Barn. & Adol. 803—805; S. C. 1 L. J. (N. S.) K. B. 1.)

An innkeeper is responsible for money belonging to his guest.

1831.  
Nov. 2.  
[ 803 ]

THIS was an action against an innkeeper at Brighton, to recover the value of a bag, containing bank-notes, lost by the plaintiff during the time he resided as a guest in the defendant's inn. Plea, not guilty. At the trial before Gaselee, J. at the last Assizes for the county of Sussex, the following appeared to be the facts of the case: The plaintiff and his wife, with a young lady (Miss Stratford), arrived at the defendant's inn in the evening of Wednesday the 1st of December, 1830, and took a sitting room and two bedrooms so situated, that the door of the sitting room being open, a person there could see the entrances into both bed rooms. On the following day, Mrs. Kent went into the bed room, and laid a reticule, which contained the money, on her bed, and afterwards returned into the sitting room, leaving the door between that and the bed room open. After she had remained in the sitting room for about five minutes, she sent Miss Stratford for the reticule, and it was not to be found. On behalf of the defendant, it was urged, among other objections, that an innkeeper was responsible for goods and chattels only, and not for money. The learned Judge reserved this point, and directed the jury to find for the plaintiff, if they thought the money was lost or stolen out of the inn. The jury having found a verdict for the plaintiff,

*Andrews*, Serjt. now moved for liberty to enter a nonsuit:

By the common law, innkeepers are responsible for goods and chattels belonging to their guests. There \*is no authority to

[ \*804 ]

(1) See now 26 & 27 Vict. c. 41, L. T. 851, C. A., where many cases and *Medawar v. Grand Hotel Co.*, '91, bearing on the general liability of 2 Q. B. 11, 60 L. J. Q. B. 209, 64 innkeepers are collected.—F. P.

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shew that they are so for money. If they be, there will be no limit to their responsibility. An innkeeper cannot know or form any judgment of the amount of money a guest may have.

LORD TENTERDEN, Ch. J. :

There are many cases where money has been recovered in an action against carriers, who, like innkeepers, are liable by the custom of the realm; and I cannot see any distinction in this respect between an innkeeper and a carrier. The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded, is, both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and such person. In the Digest, lib. 4, tit. 9, s. 1, after stating the law, that an innkeeper is liable for the goods of his guests, it is said, “Nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi.” If we were to grant the present rule we should break in upon that principle. If a lady were to leave a valuable shawl in her room, the innkeeper (though unacquainted with its value) would clearly be responsible for it if lost: and, upon the same principle, he must be so in this case.

PARKE, J. :

This case falls within the general principle upon which the liability of innkeepers is founded, and there is no distinction in this respect between money and goods.

TAUNTON, J. :

In *Calye's* case (1), the words of the writ which lies against the innkeeper are stated, and there it is observed that the words “hospitibus damnum \*non eveniat,” are restrained by the first words, “eorum bona et catalla infra hospitia illa existentia absque subtractione custodire,” &c. “which words (bona et catalla) by the said words ita quod, &c. hospitibus damnum non eveniat, although they do not of their proper nature extend to charters and evidences concerning freehold or inheritance, or

[ \*805 ]

obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them great damages happen to the guest: and, therefore, if one brings a bag or chest, &c. of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." On the same principle he must be responsible for money.

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PATTESON, J.:

There is no distinction between money and goods, as to the liability of innkeepers.

*Rule refused.*

## REX v. THE INHABITANTS OF LANCASHIRE.

(2 Barn. & Adol. 813—816; S. C. 1 L. J. (N. S.) M. C. 1.)

1831.  
Nov. 4.

[ 813 ]

By the statute 43 Geo. III. c. 59, s. 5, no bridge thereafter to be erected or built, is to be repairable at the expense of the county, unless erected under the direction of the county surveyor, &c. This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the Act.

Trustees under a Turnpike Act having built a bridge across a stream, where a culvert would have been sufficient, but a bridge is better for the public, the county cannot refuse to repair the bridge on the ground that it was not absolutely necessary.

INDICTMENT for not repairing Leigh Bridge, situate in the highway from Manchester to Wilmslow. Plea, not guilty. At the trial before Parke, J. at the Lancaster Summer Assizes, 1831, it appeared that the bridge, which was a carriage bridge, had been widened subsequently to the passing of the statute 43 Geo. III. c. 59, by the trustees of the turnpike road between Manchester and Wilmslow. The bridge was originally built by them; but had not before been chargeable to the county. The statutes under which they acted gave them a discretionary power to erect bridges; and the funds of the trust were made applicable to the repairs. The public had used the bridge in its present state for a number of years. It was urged, on behalf of the defendants, that the alteration in the width of the bridge rendered it a new bridge, and consequently brought it within the

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[ \*814 ]

fifth section of 43 Geo. III. c. 59, which exempts counties from repairing bridges erected after the passing of the Act, unless built under the direction of the county surveyor, or a person appointed by the justices at Sessions (1): \*and that this structure, not having been made under such direction, was not repairable by the inhabitants. The learned Judge reserved the point; and the jury, in answer to questions proposed by him in his summing-up, found, that it was necessary to have a bridge or culvert for the passage of a stream at the place in question; that a bridge was better for the public; but that a culvert would suffice, and would be beneficial. A verdict of guilty having been taken,

*Starkie* now moved for a rule to shew cause why a verdict of acquittal should not be entered :

This is, substantially, a bridge erected since the passing of the Act 43 Geo. III. c. 59. It cannot be said that this bridge, which the county is called upon to repair, existed at that time. The inhabitants of a county are not obliged to widen a bridge: *Rex v. The Inhabitants of Devon* (2). In that case the widening is, by two of the Judges, put upon the same footing as the making of a new bridge. BAYLEY, J. says there, "I am of opinion, that as a county is not bound to make a bridge, it is not bound to widen \*one: *quoad* the addition, that would be a making; because the addition beyond the existing width, would be *pro tanto* a new bridge." But further, it has been found by the jury that a

[ \*815 ]

(1) The words of the statute (s. 5), are, "And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain, be it further enacted, that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be

erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their General Quarter Sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual General Sessions: and which surveyor, or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same."

(2) 28 R. R. 440 (4 B. & C. 670).

culvert in this place would have been sufficient. Evidence was given at the trial that it would have been equally beneficial with a bridge; and, at all events, the county ought not to be put to the expense of doing more than is necessary for the public use. No argument can be drawn from the acquiescence of the inhabitants in the construction of a bridge; for that was done under the powers granted by the local Act; they could not therefore interfere.

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(LORD TENTERDEN, Ch. J.: Nor could they, if an individual had built it.)

If an individual erects an unnecessary bridge, it may be indicted as a nuisance: *Rex v. The West Riding of Yorkshire* (1).

(LORD TENTERDEN, Ch. J.: The words of Lord ELLENBOROUGH there are, "If it be built in a slight or incommodious manner no person can, at his choice, impose such a burthen on the county; and it may be treated altogether as a nuisance, and indicted as such.")

LORD TENTERDEN, Ch. J.:

On the point reserved in this case, I am of opinion that the defendants are not entitled to a verdict. Before the statute 48 Geo. III. c. 59, the county was obliged to repair bridges by whomsoever built, if they were beneficial to the public. The fifth section of the Act was framed for the more clearly ascertaining the description of bridges thereafter to be erected, which inhabitants of counties should be bound to repair and maintain: and it provides, "that no bridge hereafter to be erected or built in any county," \*shall be repairable at the expense of the inhabitants, unless erected under such superintendence as is there pointed out. But the case of a bridge widened, as in the present instance, appears not to have occurred to the Legislature; at all events, it is not within the words of the section. As to the special finding of the jury, it may be, that some persons thought a culvert as beneficial to the public as

[ \*816 ]

(1) 6 R. R. 439 (2 East, 342).

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a bridge, but the jury thought a bridge was better, and that being their opinion, I think the verdict was right.

LITTLEDALE, J. :

I think the Act 43 Geo. III. c. 59, s. 5, does not apply to this case. The bridge existed and was used by the public before the passing of the Act, and the county were at that time liable to repair it. The trustees widened it after the Act came in force, but it continued the same bridge. The statute only applies to bridges newly erected after its passing. As to the other point, if the jury were of opinion that a bridge was better than a culvert, I think the verdict was proper.

PARKE, J. :

I am also of opinion, that the statute applies only to new bridges, and not to those repaired or widened. As to the comparative advantages of a bridge or a culvert, I think the jury came to a right conclusion on the evidence, and that the verdict ought not now to be disturbed.

TAUNTON, J. :

I am of the same opinion. The enlargement of the bridge did not destroy its identity. It was the same bridge, though wider.

*Rule refused.*

1831.  
Nov. 5.  
[ 817 ]

## MOORE v. ROBINSON.

(2 Barn. & Adol. 817—818 ; S. C. 1 L. J. (N. S.) K. B. 4.)

A master of a fly-boat, who is hired by a Canal Company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was being towed along an inland navigation, although the vessel and the rope were the property of the Company.

TRESPASS for cutting a rope of the plaintiff, fastened to a vessel of the plaintiff, for the purpose of hauling and towing the same, and by which the said vessel was hauled and towed along the river Aire. Plea, not guilty, and a justification. At the trial before Parke, J., at the last Summer Assizes for Yorkshire, it

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appeared that the rope in question was part of the tackle belonging to a fly-boat which plied on the Aire and Calder Navigation, and was the property of that Navigation Company; and that the plaintiff was employed by the Company to navigate the boat at weekly wages, and had a mate under him in the management of the boat, whom he hired and paid. It was objected that the plaintiff had not such an interest in the boat and its tackle as would enable him to maintain trespass. But the case of *Pitts v. Gaince* (1) was cited, where Lord Holt said, that the master of a ship might maintain trespass, as the bailiff of goods might. The learned Judge allowed the trial to proceed, giving the defendant liberty to move to enter a nonsuit, and the jury found a verdict for the plaintiff.

*Blackburne* moved accordingly to enter a nonsuit:

*Pitts v. Gaince* is distinguishable from the present case, because there Lord Holt was speaking of the master of a ship, laden, and ready to sail for Dantzick. It may be necessary that the master of a vessel navigating to foreign parts should have such full powers and \*authority as may confer upon him a possessory interest therein. But that is not so in the case of a mere boat plying on a canal, where there does not exist such a necessity.

[ \*818 ]

(LITLEDALE, J. : Could the master of a vessel employed in the coasting trade maintain trespass?)

It may be difficult to draw the exact line. Here, however, the plaintiff was but a mere servant, like the carter who drives a cart.

Per CURIAM :

The plaintiff was intrusted with the management of the vessel, and had a person under him. The cases are not distinguishable.

*Rule refused.*

(1) 1 Salk. 10.

1831.  
 Nov. 16.

[ 818 ]

# REX *v.* THE JUSTICES OF MIDDLESEX.

(2 Barn. & Adol. 818—822; S. C. 1 L. J. (N. S.) M. C. 5; 1 Dowl. P. C. 117.)

Where two Acts of Parliament, which passed during the same session and were to come into operation the same day, are repugnant to each other, that which last received the royal assent must prevail, and be considered *pro tanto* a repeal of the other.

[ 819 ]

BEFORE the statute 10 Geo. IV. c. ci. the highways of St. James's, Clerkenwell, were by certain local Acts of Parliament placed under the management of trustees or commissioners. That statute, which was passed to amend the former Acts, by section 41, enacted, that from and after the commencement of that Act, the trustees or commissioners of the turnpike roads within St. James's, Clerkenwell, should be discharged from the repair of the roads lying wholly within St. James's, and the said roads should from thenceforth cease to belong to the said turnpike roads, or to be under the control or management of the said trustees, and should from time to time thereafter be repaired, maintained, supported, kept in repair, and watered by the commissioners for executing the said recited Acts and that Act. The Act 10 Geo. IV. c. ci. was to commence and take effect on the 1st of January, \*1830, and received the royal assent on the 1st of June, 1829. By ss. 7 and 8 of another Act of the 10 Geo. IV. c. lix., (for consolidating the trusts of the turnpike roads near the metropolis, north of the Thames,) which received the royal assent on the 19th of June, 1829, it was enacted, that from and after the 1st of January, 1830, the roads therein particularly mentioned (including the roads in question), should cease to be maintained and repaired, watched, watered, or lighted by the commissioners then acting, and should from thenceforth be deemed and considered to be common highways, and should from thenceforth be maintained, repaired, watched, watered, and lighted by the parishes in which the same were respectively situate, by the respective surveyors or persons appointed under and by virtue of the general Act of the 13 Geo. III. c. 78. A rule *nisi* having been obtained for a *mandamus* directed to the justices of Middlesex, commanding them to appoint a surveyor of the highways of St. James's, Clerkenwell, pursuant to the provisions of the 13 Geo. III. c. 78,

*French*, on a former day in this Term, shewed cause :

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The question is, if two contradictory Acts are passed in the same session of Parliament, to come into operation on the same day, which is to take effect ? The time at which the royal assent is given is a mere accident. In the absence of any other criterion, the intention of the Legislature must decide ; and that is to be collected from a comparison of the statutes themselves, and a consideration of the objects proposed by them, and of the manner in which they may best be made available for the public good. (He then contended, that on this view of the Acts, that of 10 Geo. IV. c. ci. ought to prevail.)

*F. Pollock and Bodkin, contra :*

[ 820 ]

The two Acts containing opposite provisions, that which last received the royal assent must be considered as virtually repealing the other. In *The Attorney-General v. The Chelsea Water Works Company* (1), (cited 2 Dwarries on Statutes, 675,) it was held by all the Barons of the Exchequer, that where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand, and be a repeal of the purview, as it speaks the last intention of the makers ; and it was compared at the Bar to a will, in which the latter part, if inconsistent with the former, shall supersede and revoke it. The decision there was, that one part of the same Act may virtually repeal the other : *à fortiori* a subsequent Act, passed in the same session, may repeal a former.

(*French* : It is observed in 2 Dwarries, 672, that “an Act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted, expressly reserving a power to do so.”

PARKE, J. : No authority is cited ; though the practice in Parliament certainly is as there stated.

LORD TENTERDEN, Ch. J. : And such clauses are not uncommon.)

*Cur. adv. vult.*

(1) Fitzgibbon, 195.

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LORD TENTERDEN, Ch. J. now delivered the judgment of the  
COURT :

[ \*821 ]

We are of opinion that this rule must be made absolute. It was objected, that by the local Act of the 10 Geo. IV. c. ci. s. 41, the roads were, "to be repaired, maintained, supported, kept in repair, and watered," by certain commissioners, and that that Act ought to prevail, although another Act (the 10 Geo. IV. c. lix.) passed subsequently, \*but in the same session, called the "Metropolitan Road Act," directs that the maintaining, repairing, watching, watering, and lighting of the roads in question shall be by the parishes in which the same are respectively situate, by surveyors appointed pursuant to the provisions of the statute 18 Geo. III. c. 78. The effect of that enactment, therefore is, to place the repairing of the same roads under the management of the surveyors of the highways. And in that respect, those Acts are undoubtedly repugnant to each other. As to repairing the roads, we are therefore of opinion that the Act which last received the royal assent must prevail. Our decision is conformable with the doctrine laid down in *The Attorney-General v. The Chelsea Water Works Company*; there it was resolved, that where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers. At the time when that resolution was come to, if two Acts of Parliament, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement on the roll, of the day on which bills received the royal assent, and all Acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session. Now, however, it is known on what day each bill receives the royal assent, it being provided by the 39 Geo. III. c. 13, that a certain Parliamentary officer shall indorse on every Act of Parliament "the day, month, and year when the same shall have passed and shall have received the royal assent; and such indorsement shall be taken to be a part of such Act, and to be the date of its commencement, \*where no other commencement shall be therein provided." It appears that, in this case, the

[ \*822 ]

metropolitan Act received the royal assent a few days after the local Act, and, consequently, we are of opinion that so far as the two Acts are contradictory to each other, the metropolitan Act, which last received the royal assent, must have the effect of repealing the other. The rule, therefore, for a *mandamus* must be made absolute.

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*Rule absolute.*

WILLIAM ROSE AND EDWARD SHEATE WHITE  
v. CORNELIUS POULTON AND OTHERS, EXECUTORS  
OF JOSEPH POULTON.

1831.  
Nov. 11.  
[ 822 ]

(2 Barn. & Adol. 822—832; S. C. 1 L. J. (N. S.) K. B. 5.)

By an indenture between A., and B. and his wife, and C. of one part, and D., and E. and the same C. of another part, it was recited, that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he F. giving sureties, namely, the said D., E. and C., for payment of an annuity to B.'s wife; and it was thereupon witnessed that, in consideration of the covenants thereafter entered into by A., B. and his wife, and C. and of 10s., the said D., E. and C. and each and every of them, covenanted with A., B. and his wife and C. to pay the annuity. There followed covenants by A., B. for himself and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. The deed was signed and sealed by D., E. and C., and by F., but not by A. or B. In an action brought by A. and B. after the death of C. for breach of the covenant to pay the annuity: Held,

First, that the omission of A. and B. to execute the deed did not disable them from suing upon it; that the omission did not amount to a total failure of consideration for the covenant sued upon (supposing such total failure to be an answer to the action), and that the covenant to pay the annuity, and those for quiet enjoyment and for assigning, were not mutual and dependent.

Secondly, that at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, though the covenant for payment was entered into both by and to C.

THE plaintiffs declared in covenant upon an indenture made between Charles Stevens, of the first part; Joseph Poulton, the testator, Charles Poulton, since deceased, and James Gurney, since deceased, of the second part; and William Rose, one of the plaintiffs, Frances Rose (late Stevens), his wife, since deceased, Edward Sheate White, the other plaintiff, and the said James

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 [ \*823 ]

Gurney, of the third part; which indenture sealed with the seals of Charles Stevens, and of Joseph and Charles Poulton and \*James Gurney, the plaintiffs brought into Court: and the declaration stated that by the said indenture the said Joseph and Charles Poulton, and, it was therein alleged, the said James Gurney, all since deceased, at the request of the said Charles Stevens (testified by his becoming a party to the instrument), did, and each and every of them did covenant to and with the plaintiffs and the said Frances Rose, and, it was in the said indenture alleged, the said James Gurney, that Stevens should pay an annuity to William and Frances Rose half-yearly, during the life of Frances, and should make a certain proportional payment, in respect of such annuity, to William Rose, if he survived Frances, and she died during the half year. Breach, non-payment of the annuity and of the proportional sum after the death of Frances. The defendants, after praying oyer of the deed, which was accordingly set out, pleaded several pleas, averring that the plaintiffs Rose and White never executed, nor did either of them ever execute the supposed indenture or any counterpart thereof; and as a further plea, that James Gurney in the indenture described as of the second part, and James Gurney therein described as of the third part, were one and the same person; and that the said James Gurney did, in the lifetime of all the parties, execute, seal, and deliver the said indenture, and become a party thereto. To these pleas there was a general demurrer. Joinder in demurrer.

[ \*824 ]

The indenture set out on oyer recited the will of Thomas Stevens, the first husband of the said Frances Rose, whereby he bequeathed the stock, crops, &c. of a certain farm holden by him, to the said Frances, the said Edward Sheate White, and the said James Gurney, (whom he appointed his executrix and executors,) in trust that White and Gurney should permit Frances to \*hold and enjoy the same as in the will was directed; and there was a codicil, also set out, directing that if Frances should marry again, she should immediately give up the farm to the testator's son, the said Charles Stevens, on the terms, and provided, that he should secure to her an annuity of 20*l.* during her life, and give security to the trustees for payment of certain legacies left in the

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will. It was then further recited that the said Frances had since the testator's death, intermarried with the said William Rose, and that Charles Stevens, the son, had thereupon requested Rose and his wife, and the said E. S. White and James Gurney, to surrender the farm to him, upon Joseph and Charles Poulton and James Gurney becoming sureties to them for the payment of the annuity and fulfilment of the other terms of the will; to which request they the said W. Rose and Frances his wife, E. S. White and James Gurney, "had mutually consented and agreed." And it was therefore witnessed by the said indenture that "in consideration of the covenants thereafter entered into by the said William Rose and Frances his wife, E. S. White and James Gurney, and in further consideration of the sum of ten shillings" by them or one of them paid to each of them the said Joseph Poulton, Charles Poulton, and James Gurney, the receipt of which they respectively acknowledged, they the said J. and C. Poulton and James Gurney, at the request of the said Charles Stevens, testified by his executing the indenture, did, and each and every of them did covenant to and with Rose and his wife, White, and James Gurney, and each of them, that Stevens should pay the said annuity of 20*l.* to Rose and his wife, and a proportional sum to Rose in case of his wife's dying in the course of the half year, and his surviving \*her, and should also fulfil the other directions of the will. It was further witnessed that Rose for himself and his wife, and also E. S. White and James Gurney, each and every of them for himself only, did covenant to and with Charles Stevens, and to and with J. and C. Poulton, and James Gurney, that Stevens should quietly enjoy the farm, &c. without interruption from Rose and his wife, White and James Gurney, or any or either of them, or any claiming under them, and that Rose and his wife, White and James Gurney, would execute an assignment of the lease to Stevens when required. The deed was signed and sealed by Charles Stevens, J. and C. Poulton, and James Gurney, but by no other person.

[ \*825 ]

*R. Bayly*, in support of the demurrer :

It is no objection to the right of the plaintiffs to recover, that they did not execute the deed. "If one party executes his part

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of an indenture, it shall be his deed, though the other does not execute his part." Com. Dig. Fait, (C) 2. Parties named with others in a covenant as covenantees, although they did not seal, may join in an action, *Vernon v. Jefferys* (1); and those who may, must join, *Petrie v. Bury* (2). (Here he was stopped by the COURT.)

*Richards, contra* :

[ \*826 ]

The covenants by Joseph and Charles Poulton and James Gurney, were in consideration of the covenants after mentioned, which were to be entered into by William and Frances Rose, White, and Gurney, for securing possession of the farm to Stevens. Those covenants never having been entered into, the consideration fails; and it is laid down in Com. Dig. Covenant, (F), that "If the foundation of the covenant fails, the covenant also fails: as, if a lease be \*agreed on and the lessee executes his part, but the lessor does not execute his part, whereby there is not any lease; the covenants in the indenture sealed by the lessee, and also the bond for performance of covenants, are void;" to which point *Soprani v. Skurro* (3) is cited, and that case was recognized in *Capenhurst v. Capenhurst* (4). In *Glazebrook v. Woodrow* (5), the plaintiff covenanted to convey his property in a school-house to the defendant on or before the 1st of August, 1797, and to surrender the same on or before the 24th of June, 1796, and in consideration thereof, the defendant covenanted to pay him 120*l.* on or before the said 1st of August. The plaintiff sued the defendant for non-payment of the money, but it appearing that the plaintiff himself had not executed a conveyance of the property, (though he had delivered possession,) it was held that he could not recover. So here, the parties whom the defendant represents, entered into a covenant for payment of an annuity, but nothing has been executed by the other parties to give him a cross-remedy for any failure in what was to be performed by them. It is not even averred in the declaration that Stevens had possession of the property, or derived any benefit whatever from the deed. It

(1) 2 Stra. 1146.

(2) 27 R. R. 383 (3 B. & C. 353).

(3) Yelv. 18.

(4) Sir T. Ray. 27.

(5) 4 R. R. 700 (8 T. R. 366).

may be that Rose and White refused to execute the deed ; and, in such a case, the Court would surely not enforce it in their favour against the other parties.

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The other objection is, that James Gurney, who is one of the covenantors in this deed, is also a covenantee: and it is well established that a man cannot sue himself: *Moffat v. Van Millingen* (1), *Bosanquet v. Wray* (2). It is true, Gurney is dead, but that can \*make no difference. This deed was to secure an annuity for the life of Frances Rose ; its validity, or capability of being enforced, cannot have been meant to depend on the life of any of the other parties.

[ \*827 ]

(LORD TENTERDEN, Ch. J. : The covenant is joint and several. Why should not any of the covenantees sue alone ?

PARKE, J. : Or all the covenantees sue a single covenantor ?)

*De Tastet v. Shaw* (3) is an authority against such an action.

(PARKE, J. : There the covenantees were jointly interested. If in that case a surety had been introduced, who had bound himself jointly and severally with the covenantor, the question would have been like the present.)

Even in such a case, if one covenantor were sued and compelled to pay damages, he would be entitled to contribution from the others : so that a covenantee, situated as Gurney was here, would, on the one hand, be suing a party who was surety together with himself, and on the other, would be liable to such surety for contribution. And this was a reason assigned, in *Teague v. Hubbard* (4), for the judgment of the Court, that an indorsee, member of a company, could not recover upon bills of exchange against the drawer, who was also a member. It cannot be argued that the plaintiffs, by rejecting Gurney as a covenantor, could deprive the other parties of their right to contribution from him. It is true, Gurney is now dead, but the argument on the other side, if maintainable, must go the whole length of shewing

(1) 5 R. R. 557 (2 Bos. & P. 124, n.)

(3) 1 B. & Ald. 664.

(2) 16 R. R. 677 (6 Taunt. 597).

(4) 8 B. & C. 345.

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that, even in his lifetime, his covenant might have been left out of consideration.

[ \*828 ] (PARKE, J. : If this could \*not be done in his lifetime, it does not follow that it might not after his death : *Richards v. Richards* (1).)

*R. Bayly*, in reply :

It is true, as laid down in the cases which have been cited, that a man cannot sue himself. But neither can he covenant with himself ; and, therefore, the supposed covenant to which Gurney is a party might be treated as a nullity as far as he was concerned. The declaration meets this view of the case. As to the objection, that the plaintiff did not execute the indenture, the consideration for the present covenant is, in substance, that Rose and his wife, White, and Gurney, had assented to Stevens's request to have the farm surrendered up to him. It is a past consideration ; that in *Glazebrook v. Woodrow* (2) was future, and never took effect ; and there is the same distinction between the present case and others which have been cited. Any objection, merely founded on the non-joinder of one covenantee, should have been taken in abatement.

LORD TENTERDEN, Ch. J. :

I am of opinion that the plaintiff is entitled to judgment. The first objection to his claim is, in substance, that there has been a failure of consideration for the covenant on which this action is brought. Whether an entire failure of consideration will in all cases relieve a party from the obligation of his deed, it is not necessary at present to enquire. In the case of a lease not executed by the lessor, it certainly does, because, in default of such execution, there is no lease. But here the whole consideration has not failed. [ \*829 ] \*The deed set out on oyer recites, that Stevens had applied to Rose and his wife, White and Gurney, to surrender the farm to him, upon security given for payment of the annuity, and that they had consented and agreed. This agreement is, in fact, part of the consideration. In the deed it

(1) P. 619, *ante* (2 B. & Ad. 447).

(2) 4 R. R. 700 (8 T. R. 366).

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is certainly expressed, that the covenants made by the Poultons, together with Gurney, are in consideration of the covenants entered into by Rose and his wife, White and Gurney, and of 10s. It would have been more artificial to say, "in consideration of the premises, and of 10s.;" but the meaning is clear. The cases cited, in which covenants have been entered into in contemplation of a lease to be granted, do not apply: here the covenantors have in part had the benefit of the consideration. It cannot be said that the whole has failed, because a covenant for quiet enjoyment was not duly executed. Then as to the second point. The covenant on which this action is brought was made to Rose and his wife, White and Gurney, jointly and severally. The action is brought by Rose and White jointly; they, therefore, treat it as a joint covenant: if it were several they could not sue together. But, considering the covenant as joint, no objection arises from Gurney having been a party to it, though he was also a covenantor. His death removes any difficulty as to contribution, and leaves no incongruity in point of form. The case is not so strong as that of *Richards v. Richards* (1); for it was held there, that a married woman, to whom a joint and several note had been given by her husband and two other persons, might, on his death, sue the other parties upon it; and, further, that the Statute of Limitations \*did not begin to run against the claim till after the husband was dead.

[ \*830 ]

PARKE, J. :

As to the objection that the covenantors (with the exception of Gurney) never executed the indenture; in *Clement v. Henley* (2) it was held too clear for argument, that if an indenture of charter-party is made between A. and B., on the one part, and C. and D., on the other, and there are covenants on each side, and A. alone seals on the one part, and C. and D. on the other, but it is expressed throughout the indenture that A. and B. covenant and are covenanted with, in such a case A. and B. may join in an action against C. and D. for breach of one of the covenants. But a difficulty is suggested here, because the covenant sued

(1) P. 619, *ante* (2 B. & Ad. 447).

(2) 2 Roll. Ab. Faits, (F.) 2.

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upon is made in consideration of the covenants thereafter entered into by the other parties. This, however, is giving to a "consideration" the effect of a condition; an operation which that word clearly ought not to have. In actions upon instruments under seal, the consideration is not material; and, at all events, in this case, it has not totally failed. If the present objection prevailed, there is hardly any case in which a deed is set out on oyer, where the plaintiff could succeed if he did not distinctly aver that all the covenants on his part had been fulfilled. With regard to the other objection; this is a covenant made to the covenantees jointly and severally. The present plaintiffs and Gurney had, in fact, no joint interest of their own: if they sued together, they could do so only as trustees for the person really concerned; and I do \*not see why such an action might not have been brought by the three trustees in the lifetime of Gurney. But, he being dead, the case falls within the authority of *Richards v. Richards* (1).

[ \*831 ]

TAUNTON, J. :

There is a well-known distinction between cases where the consideration for doing a thing is the doing of some other thing, and where it is merely the covenanting to do such thing. *Glazebrook v. Woodrow* (2) was a case of the former kind; and the covenants there were considered as mutually dependent. But in this indenture the covenantors bind themselves in consideration of the covenants thereafter entered into by the other parties, and of ten shillings. The "covenants thereafter entered into" were not a condition precedent, but were independent covenants; and there was not a total failure of consideration; at least the ten shillings were received. As to the second point, I think no objection arises from Gurney being one of the covenantees. Taking the covenant as one made to them jointly, upon his death the remedy survives to the other two; and there is then no incongruity in their availing themselves of the joint remedy, though against parties with whom Gurney joined as a covenantor.

(1) P. 619, *ante* (2 B. & Ad. 447).

(2) 4 R. R. 700 (8 T. R. 366).

PATTESON, J. :

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I am of opinion that there was not a total failure of consideration between these parties ; and if there had been, the cases cited on that head do not apply : for they are all cases in which a lease was in contemplation, and where, in consequence of the non-execution, the relation of landlord and tenant never was \*created. In *Glazebrook v. Woodrow* (1) the covenants were mutual and dependent: here the very expression, “in consideration of the covenants hereinafter entered into,” excludes the supposition that any thing future was in contemplation, on which the performance by the Poultons and Gurney of their covenants was to depend. I do not see, therefore, how it is possible to say that the covenants in this deed were mutual and dependent. On the other point, I think no objection arises to this action from Gurney having been a covenantor as well as covenantee, for the reasons already given.

[ \*832 ]

*Judgment for the plaintiffs.*

JEFFERYS, GENTLEMAN, ONE, &C., v. GURR, TREASURER  
OF THE GUARDIANS OF CHATHAM POOR (2).

1831.  
Nov. 11.

(2 Barn. &amp; Adol. 833—844; S. C. 1 L. J. (N. S.) K. B. 23.)

[ 833 ]

By an Act, 42 Geo. III. c. 56, for enlarging the poor-house of the parish of Chatham, certain persons therein named, and their successors, were appointed guardians of the poor in C., and trustees for putting the Act in execution ; and in order that there might be an impartial succession of guardians, and to keep up the specified number, it was provided, that eight should go out of office yearly, and that the parishioners should re-elect the same persons, or other inhabitants of the parish in their stead. By other sections the guardians were empowered to raise money by mortgage or grant of annuity, to purchase land, and to take a conveyance to themselves and their successors : and they were to sue and be sued in the name of their treasurer for the time being, who was to be reimbursed by the guardians all costs and damages to which he should be put as plaintiff or defendant in such action.

A. was treasurer to the said guardians under the provisions of the Act from 1805 till 1811, and from 1811 to 1828.

By a decree of the Court of Chancery in 1808, the parish of C. was adjudged to be entitled, in respect of such part of it as was within

(1) 4 R. R. 700 (8 T. R. 366).

Council (1890) 25 Q. B. Div. 384,

(2) Cited and discussed in *Mayor,*

59 L. J. Q. B. 576.—R. C.

*dc. of Salford v. Lancashire County*

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the city of Rochester, to two thirty-second parts of certain revenues bequeathed for the use of the poor of that city, and a sum of 1,115*l.* was paid over to A. as treasurer, on that account. That sum he, by order of the then guardians, paid over to them in 1822, and they applied it to the use of the poor of the whole pariah. On the petition of the inhabitants of that part of the pariah which was within the city of Rochester, the plaintiff, after he ceased to be treasurer, was ordered by the Court of Chancery to pay the above-mentioned sum which he had received as treasurer, into Court, in order that it might be applied to the exclusive use of Chatham intra. He accordingly paid the amount, and brought an action against the guardians to recover it:

Held, that the guardians were, for the purposes of suing or being sued, in the nature of a corporation, and that A. was entitled to recover in an action against the now treasurer the sum paid by him into the Court of Chancery, as money paid to the use of the guardians.

ASSUMPSIT for money lent to the guardians of Chatham poor by the plaintiff; and for money paid for their use, and had and received by them for the plaintiff's use. Plea, the general issue. At the trial before Alexander, C. B., at the Spring Assizes for the county of Kent, 1829, a verdict was entered for the plaintiff for 1,115*l.* 12*s.* 4*d.*, subject to the opinion of this Court on the following case:

R. Watts, by his will, dated 1579, left certain monies to be placed out at interest by the mayor and citizens of Rochester, and the interest and profits to be employed for the support and augmentation of an alms-house then erecting in that city, and for the reception and relief of \*poor travellers in the said house. And further, to support the said house, and to purchase stuff to set the poor of the city to work, he gave the mayor and citizens all other his lands, tenements, and estates for ever. The revenues of the charity having increased, the parishes of St. Margaret and Strood, which were partly within the liberties and precincts of Rochester, in the year 1672 complained in Chancery that they had no share of Mr. Watts's Charity, and upon that complaint, were adjudged by the Court to be entitled to a certain share of the rents and profits arising, and to arise, from the said estates. In 1802, an Act of Parliament was passed (42 Geo. III. c. 56, public local Act,) for the better relief of the poor of the parish of Chatham, which Act nominated and appointed certain persons and their successors (to be elected as therein mentioned), guardians of the poor of the said parish, and trustees for putting that Act

[ \*834 ]

in execution (1). In May, 1805, the plaintiff was duly \*elected treasurer to the guardians of the poor pursuant to the Act, and continued to hold that office till the 1st of June, 1811. In May, 1820, he was again elected \*treasurer, and he continued in that office till the 24th of April, 1828, when he resigned, and was succeeded by the defendant, who, at the time when this action was brought, continued to be treasurer.

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[ \*835 ]

[ \*836 ]

(1) By sect. 1 the perpetual curate of the parish of Chatham, such justices of the peace for the county of Kent as should be resident in the said parish, the lord or lady of the manor and hundred of Chatham, the resident commissioner of his Majesty's dock-yard in the said parish, the resident storekeeper of his Majesty's ordnance, the high constable of and for the manor and hundred of Chatham, and the churchwardens and overseers of the poor of the said parish, and every and each of them respectively for the time being, and twenty-four other persons therein named, and their successors (to be elected in manner hereinafter mentioned), were nominated and appointed guardians of the poor of the parish of Chatham, and trustees for putting the Act in execution.

By sect. 2, that there might be an impartial succession of guardians chosen out of the inhabitants of the said parish, and in order to keep up the number of twenty-four (exclusive of the persons who were to be guardians in right of their office or station), it was further enacted, that eight should go out yearly, and the parishioners should either re-elect the same persons or other persons, inhabitants of the parish, in their stead, who should be joined with the remaining guardians, and have the same power and authority.

Sect. 4 provided for supplying vacancies by death of any guardian or his leaving the parish, &c., and for regulating the elections.

By sect. 8 all messuages, lands, &c. goods, chattels, and effects which the minister, churchwardens and overseers, or other persons were entitled to or possessed of in trust for the parishioners for the use of the poor, were after the passing of that Act, in like manner to be possessed by and belong to the guardians upon the trusts in that Act contained.

By sect. 9 lands and money coming to the churchwardens or overseers, or to trustees, for the use of the poor, by any will or deed, were to be conveyed, assigned, and paid to the guardians or their treasurer, to be applied to the appointed uses, provided that the guardians might permit the then trustees, treasurers, &c. to continue in the management of any trust estate or fund, for such time as the guardians and their successors should think fit.

By sect. 18 the guardians were empowered by writing under their hands to direct the treasurer from time to time to pay all sums of money by him received on account of the poor's rate, or on account of the poor of the said parish, and applicable to the relief thereof, to such persons and in such manner as they should think necessary and expedient for the purposes of the Act; and the treasurer was authorized and required to pay the same accordingly; which sums so paid should be allowed him in his accounts.

By sect. 27 the guardians were authorized to purchase lands, not exceeding two acres, and to take a

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In June, 1808, the plaintiff, pursuant to the resolution and order in writing of the then guardians of the poor, and as their treasurer (he also acting as their solicitor in the matter), filed an information in Chancery in the name of the then Attorney-General on his, the plaintiff's, relation as such treasurer, against the mayor and citizens of Rochester, and the churchwardens and overseers of the poor of the parishes of St. Nicholas, St. Margaret, and Strood, praying to participate in the rents and profits of Watts's Charity in respect of so much of the said parish of Chatham as was within the liberties, &c. of Rochester; and by a decree thereupon made, the parish were adjudged to be entitled to two thirty-second parts of the aforesaid rents and profits; and by two orders of the VICE-CHANCELLOR in the suit, made 11th of March and 27th of July, 1822, the sums of 620*l.* 18*s.* and 494*l.* 14*s.* 4*d.*, being respectively two thirty-second parts of sums accumulated from the annual revenues of the charity, were ordered to be paid to the treasurer of the guardians of the poor of the parish of Chatham, the former sum out of the funds then in Court, and the latter out of the funds then in the hands of the mayor and citizens. The plaintiff, as treasurer of the guardians, received the sums out of Court, and from the mayor and citizens of Rochester, in July and September, 1822.

In October, 1822, the inhabitants of that part of the parish of Chatham which lies within the limits of the city of Rochester, and is called Chatham intra, gave a notice \*to the guardians

[ \*837 ]

conveyance thereof to them and their successors, and to erect a workhouse thereon.

Sect. 28 enabled them to take grants of waste lands for the benefit of the poor, to the guardians and their successors for ever.

And by sect. 32 they might contract (in writing) for the adding to, altering, repairing, or furnishing any poor-house or workhouse for the parish.

By sect. 36 they were authorized to borrow money by mortgage of the before-mentioned estates and the poor's rates. And by sect. 37, to grant annuities for the purposes

mentioned in the Act, such annuities to be paid out of the rates therein-before mentioned.

By sect. 39 it was enacted, that the guardians might sue and be sued in the name of their treasurer for the time being, provided that every such treasurer, in whose name the action or suit should be commenced, prosecuted, or defended, should always be reimbursed and paid out of the monies to be received by the guardians by virtue of that Act, all such costs, charges, damages, and expenses as he should be put to or become chargeable with by reason of his being so made plaintiff or defendant.

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of the poor of the parish of Chatham for the time being, and the plaintiff as their treasurer, to apply the whole of the monies received and to be received by them in respect of Watts's Charity to the exclusive benefit of that part of the parish of Chatham lying within Rochester, and not for the benefit of the parish at large. The guardians, at a meeting held in December, 1822, required the plaintiff to pay over to them the sums so by him received; and the plaintiff thereupon apprized them of the notice he had received, but the guardians insisted on his paying over the monies as required by them. The plaintiff then requested the guardians, in case of his paying over the monies, to set them apart, or invest them as they should think proper, until the question of their application should be settled; but the guardians refused to do either, and made an order upon him to pay the monies, and gave him a discharge for so doing. The money being accordingly paid over by the plaintiff to the guardians, was mixed with their general funds, and expended in the general maintenance of the poor of the whole parish of Chatham, there being only one workhouse, and one fund for the maintenance of the poor. The whole sum was so expended within a few months after payment of it by the plaintiff, the trustees judging that they could not legally make a rate upon the inhabitants with such a balance in their hands. On the 14th of May, 1828, certain inhabitants of Chatham intra petitioned the Chancellor to declare that the two thirty-second parts of the yearly produce of Watts's Charity ought to be applied to the benefit of the poor of that district, and to appoint trustees and receivers of the same, and to order the said sums received by the plaintiff as treasurer of the guardians of the poor of the parish of Chatham to be \*paid to such trustees; and being upon such petition declared entitled to the exclusive benefit of the said two thirty-second parts, they obtained from the Master of the Rolls (in June, 1828) an order upon the plaintiff to pay into Court the said two sums of 620*l.* 18*s.* and 494*l.* 14*s.* 4*d.*, which he accordingly did, and the same were afterwards, under the direction of the Court of Chancery, applied for the benefit of the inhabitants of Chatham intra. This action was brought to recover the amount.

[ \*838 ]

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*Campbell*, for the defendant, being asked by the COURT what were the objections to the action, stated them as follows :

First, as the guardians are not a corporate body, and as the action must be considered to be brought against the persons who were guardians when it was commenced, the present guardians are not liable for the sum now claimed, as money had and received by them. For it does not appear that any person who was guardian when the money was received was also guardian when the action was commenced. Secondly, this was not money paid at the request of the present guardians. Thirdly, neither was it even the plaintiff's money which he paid over, it was what he had received from the Court of Chancery, and the Mayor, &c. of Rochester. Fourthly, it was a payment made by the plaintiff in his own wrong, under a mistake of law. Fifthly, this money has been expended, and cannot be recovered, so that the judgment would be a nullity, for the treasurer is not personally liable, since by s. 39 he is to be reimbursed all damages, and expenses he shall be put to, out of the monies received by virtue of the Act: and it is clear the guardians cannot make a rate for the costs and damages of this action.

[ 839 ]

*Platt*, for the plaintiff :

The plaintiff is entitled to maintain this action. In the first place, the guardians of the poor, if not a corporation, are, at least, a continuing body for all the purposes of the local Act. It is not even necessary that the individual members should be changed from year to year. They have powers given them by the statute for certain purposes, which cannot be accomplished unless the guardians are to be a continuing body. Those purposes, among others, are the erecting and providing a workhouse, by section 27; making contracts for the altering and repairing of the poor-house, and for other matters, by s. 32; borrowing money on mortgage, by s. 36, and the granting of annuities, by s. 37. Even if, according to *Tawney's* case (1), the guardians have not authority to make a rate to reimburse themselves for this money specifically, yet they are not bound to designate the purpose in

(1) 2 Salk. 531; 2 Ld. Raym. 1009.

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the rate. But this judgment will be a charge upon the defendant, brought upon him by reason of his being made defendant. He will, therefore, clearly, within section 39, be entitled to be reimbursed by the guardians. Then it is said that the first payment to the guardians was made by the plaintiff in his own wrong. But by the eighteenth section, the treasurer is to pay the monies received by him, on account of the poor, as the guardians shall order and direct. Accordingly, the plaintiff having received a sum of money on account of the poor, the guardians order and direct him to pay it over to them. He was bound to obey them, and did so. Afterwards he was compelled to pay back that same sum. As their treasurer, he might have \*been sued for this money, and he therefore paid it for them and for their use. If he had continued treasurer, and been sued, and had paid it after the action, he could have been reimbursed; so he may also under the present circumstances.

[ \*840 ]

*Campbell, contra:*

The guardians are not a corporation. It is said, that it may be assumed that there is no change of persons, but the guardians are to be chosen yearly.

(TAUNTON, J: They may be re-elected.)

Eight must go out of office every year. Then the money had and received by the guardians in 1822 cannot be money had and received by those who are guardians in 1830. There is nothing in the Act to constitute them a corporation; they are only substituted for the churchwardens and overseers of the poor who perform the same functions in other parishes.

(LORD TENTERDEN, Ch. J.: They may borrow money and grant annuities.)

Only for the purposes of the Act; and such powers are given to all churchwardens and overseers by the 59 Geo. III. c. 12. No doubt a corporation may be created by implication without charter or seal: *Conservators of the River Tone v. Ash* (1), where

(1) 34 R. R. 441 (10 B. & C. 349).

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the purposes of the appointment cannot be carried into effect, unless they are made a corporation. But that is not the case here: and it would be hard if the guardians could hold the present inhabitants liable for charges incurred by former guardians at a distant period.

(PATTESON, J.: There is a clause which empowers them to take land to them and their successors.)

[ \*841 ]

The powers granted to them can only apply to such acts as they are authorized to do under the statute. Then this is not money paid to the \*use of the guardians; they did not direct the plaintiff to refund. Neither was it his money which the guardians received from him in the first instance. It was received by him from the Court of Chancery, and he was wrong in paying it over to the guardians. This falls within the principle of the cases of *Bilbie v. Lumley* (1), *Briabane v. Dacres* (2), and *Skyring v. Greenwood* (3), and being money paid under a mistake of law is not recoverable. Then as to the reimbursement, the rate cannot be laid for a purpose which may not be expressed. And the guardians could not make a rate expressly to reimburse themselves for money laid out eight years ago: *Rex v. Goodcheap* (4).

*Platt*, in reply, was stopped by the Court.

LORD TENTERDEN, Ch. J. :

No one can doubt that in moral justice the plaintiff ought to recover; and I am glad that there is not any legal objection to prevent him. The first point is, that the guardians of the poor are not a corporation. It is unnecessary to say whether, strictly speaking, and for all purposes, they constitute a corporation, because I am of opinion that they are so in substance and effect for all the purposes of this Act. They have perpetual succession; they are to continue for all time; they may take land, and make contracts which shall be binding, not upon themselves personally, but upon the persons filling the office. Indeed if this were not so, no one would accept it. They are, then, in the nature of a

(1) 6 R. R. 479 (2 East, 469).

(3) 28 R. R. 264 (4 B. & C. 281).

(2) 14 R. R. 718 (5 Taunt. 143).

(4) 3 R. R. 139 (6 T. R. 159).

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[ \*842 ]

corporation for the purposes of the Act. Then as to the plaintiff's title to \*reimbursement. Mr. Jefferys was the treasurer of the guardians. He preferred an information in the Court of Chancery for the benefit of that part of the parish which was within the liberties of Rochester, praying that a certain portion of the charity fund should be paid to them: a general order was made by the Court of Chancery to pay the money to the treasurer of the guardians of the poor; but no direction was given how it was to be applied. The guardians ordered him to pay it to them, and he paid it to them. If they did not apply it as they should, I do not see how he could help it. Then a petition was presented to the Lord Chancellor on the part of the specific district of Chatham intra; and the Court, thinking the money ought not to have been applied as it had been, ordered the plaintiff to repay it, which he did. Under these circumstances, I think he must be considered as having paid that money for the use of the guardians of the poor, for it was money which they ought to have paid, and consequently that he is entitled to recover it. Then, it was urged that the defendants had no means of reimbursing the plaintiff. But there is a special provision in the Act which authorizes the guardians to reimburse the treasurer, out of the monies to be received by them under the Act, all costs, charges, damages, and expenses which he shall be put to by reason of his being made a defendant. Damages and costs will be recovered by this judgment against the defendant who is treasurer, and for these he may, by the terms of the action, be reimbursed. I do not know that the guardians may not make a rate specifically entitled for this purpose. It is said that this will fall hard upon the present inhabitants. That may be so. But the inhabitants of \*a parish are for many purposes considered as a continuing body. It is so in cases of actions against the hundred; and where the collectors of land or assessed taxes are found deficient, there must be a re-assessment, and the inhabitants must make good the deficiencies, though they may be different persons.

[ \*843 ]

PARKE, J.:

It is clear, on the thirty-ninth section, that the action is to be

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brought against the person who is treasurer at the time when it is so brought. The defendant was so here. Then what is the case? The plaintiff, by compulsion of law, paid money which ought to have been paid by third persons. The money being in his hands as treasurer, an application was made by the solicitors of the district, claiming it; but he was compelled to pay it over to the trustees his masters. Proceedings were afterwards taken against him, and, as between him and his masters, they ought to have repaid it, but they did not. He was compelled to pay it, and he can now recover it from the guardians, who will have no difficulty in reimbursing themselves.

TAUNTON, J. :

[ \*844 ]

Without considering for what purposes the guardians of the poor under this Act constitute a corporation, I am of opinion that, for the purpose of suing and being sued in the name of their treasurer, they are in the nature of a corporation, and that the action is properly brought against the present treasurer. It is said that the payment by the plaintiff to the guardians was in his own wrong. I think the converse of that is undoubtedly true; that the receipt of the money by them was a receipt in their own wrong. I do not see how the plaintiff could have refused to pay it over, when they \*insisted on his doing so. Afterwards there was an order of Court by which he was directed to pay the same money over for the benefit of certain persons appointed as trustees of the poor of Chatham. Under that order, made by a competent jurisdiction, he was bound to pay the money into Court. He did so, and paid so much to the trustees out of his own pocket. It is said there never was any money had and received by the guardians to the plaintiff's use; but, if not, still this was money paid to the use of the guardians. The plaintiff having paid over to them as their servant a certain sum of money which he was afterwards compelled to repay into Court for them and on their account, it is money paid to their use. Then it is said, the guardians cannot make a rate to meet this demand; but the treasurer for the time being is the defendant on the record. If he is bound to pay, he is entitled to be reimbursed by them.

PATTESON, J.:

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The Act of Parliament says, that the guardians shall sue and be sued in the name of their treasurer. It does not make the treasurer liable. That being so, I think that this action is maintainable on the count for money paid, for the plaintiff has advanced a sum of money which the guardians ought to have paid. The defendant, as their present treasurer, is liable at the plaintiff's suit, and there will be no difficulty in making a rate to reimburse him.

*Judgment for the plaintiff.*

**REX v. THE INHABITANTS OF MUCH COWARNE (1).**

(2 Barn. & Adol. 861—865; S. C. 1 L. J. (N. S.) M. C. 4.)

An idiot, though separated from his parent after the age of twenty-one, cannot be emancipated.

1831.  
Nov. 12.  
[ 861 ]

UPON an appeal against an order of two justices, whereby John Yarnold was removed from the parish of Great Witley, in the county of Worcester, to the parish of Much Cowarne, in the county of Hereford, the Sessions confirmed the order, subject to the opinion of this Court on the following case:

The father and mother of the pauper were married in the year 1792, and the pauper was born in 1798, and is and always has been an idiot. The pauper and his father and mother resided together in the parish of Great Witley, the then legal settlement of the father, till 1822, when the mother died. In 1824 the father \*left the pauper (being then about thirty-one years old) in the parish of Great Witley, and hired himself out as a servant in husbandry to different masters during that year, and also during the year 1825, and until he married a second wife in 1826: he then went to Much Cowarne, the appelland parish, and resided there upon some property belonging to his second wife until her death in 1830, and there gained a settlement. After the father left Great Witley he never returned to it; but the officers of that parish took care of the pauper, and never applied

[ \*862 ]

(1) Cited and distinguished in *Overseers* (1882) 10 Q. B. D. 172, *Salford Guardians v. Manchester* 175; 52 L. J. M. C. 34, 36.—R. C.

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to the father for any assistance or remuneration for what they paid. The Court of Quarter Sessions found that the pauper was incapable of taking care of himself, through imbecility of mind, at the time of the separation from his father, seven years since, and that previously to that time he was not emancipated, from the same cause. The question for the consideration of this Court was, whether, under the above circumstances, the pauper's settlement was in the parish of Much Cowarne or not.

*Shutt and W. J. Alexander* in support of the order of Sessions :

[ \*863 ]

The pauper being an idiot, the question is, whether he could be emancipated after he had reached the age of twenty-one. The doctrine of emancipation at that age proceeds upon the presumption that the child ceases then to require the protection of his parents, and can provide for himself. But an idiot cannot provide for himself, since he can make no contracts that will bind him : *Beverley's* case (1). Besides, the Sessions have expressly found that he was incapable of taking \*care of himself through imbecility of mind. It is obvious, therefore, that such a person must require the protection of another. In *Rex v. Offchurch* (2) Lord KENYON says, " Ordinarily speaking, one of these things must happen before the son can be said to be emancipated. Either he must have obtained a settlement for himself, or have become the head of a family, or at most he must have arrived at that age when he may set up in the world for himself." The pauper has satisfied none of these tests, for it cannot be said that he has arrived at an age when he can set up for himself in the world. Then the separation of the idiot from his parent makes no difference in this case : *Rex v. Broadhembury* (3). " The reason of drawing a distinction between separation before and after the child has attained the age of maturity ceases when imbecility of mind or body induce the necessity of its continuing in a sort of perpetual pupilage " : 1 Nolan's Poor Laws, 320. The relief to the pauper in the parish of Witley was no evidence of his settlement : *Rex v. Coleorton* (4).

(1) 4 Co. Rep. 124 b.

(2) 3 T. R. 114.

(3) 2 Bott, pl. 66, 6th ed. ; Cald. 498.

(4) 1 B. & Ad. 25.

*Godson, contra:*

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The question is not, whether the pauper was able to provide for himself or not at twenty-one? but, whether, after he has attained that age, the policy of the poor laws will suffer him to be removed, as part of his father's family, whenever his parent may gain a fresh settlement? That cannot be allowed. In *Rex v. Broadhembury* (1) the pauper was not twenty-one at the time of the separation; and that distinction prevails in all the cases: *Rex v. Wilmington* (2), *Rex v. Hardwick* (3). \*In the last-named case, it is laid down by Lord TENTERDEN that the parent's new settlement will not be communicated to the child, unless in fact he continues part of the family. Here the pauper was not living with his parent, and did not form a part of the family when he attained twenty-one. The distinction between a voluntary and a compulsory separation is immaterial, as Mr. Justice HOLROYD observed in the same case. The circumstance of the pauper being an idiot does not vary this proposition: for he cannot, at his present age, be removed from parish to parish as his parent's settlement may change: *St. Michael's in Norwich v. St. Matthew's in Ipswich* (4); and he is not removed to form a part of his parent's family, but to relieve the parish of a charge. It is not necessary that the son should have gained a settlement for himself: *Rex v. Stanwix* (5).

[ \*864 ]

LORD TENTERDEN, Ch. J.:

The order of Sessions must be confirmed. A child unemancipated follows the settlement of his father; and the general rule is, that until he reaches twenty-one, the child is not emancipated, unless he becomes the head of another family, or does some act to gain a settlement; but if, after twenty-one, he separates himself from his father's family, he is emancipated. Why is twenty-one the period thus fixed by the law? Because at that age the party is presumed in law to be competent to take the management of his own affairs. Here the pauper never was, and never will be competent to do so. The reason, therefore,

(1) 2 Bott, pl. 66, 6th ed.; Cald. 498.

(2) 5 B. &amp; Ald. 525.

(3) 5 B. &amp; Ald. 176.

(4) 2 Bott, pl. 58.

(5) 5 T. R. 670.

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[ \*865 ]

\*for which that period is fixed upon in other cases, wholly fails in this.

PARKE, J. :

If the pauper were a minor, he would have continued unemancipated. Now it is found he was incapable of maintaining and taking care of himself, through imbecility of mind ; he must therefore be considered as in the same situation as if he had remained a minor.

TAUNTON, J. :

The rule has been correctly stated to be, that where a party, after twenty-one, separates from his father's family, and can provide for himself, and requires no farther protection, he is emancipated. That rule does not apply here.

PATTESON, J. :

The words, in *Rex v. Hardwick* (1), that "where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless, in fact, the child continues part of the family," must apply only to a member of the family capable of supporting himself.

*Order of Sessions confirmed.*

1831.  
Nov. 14.  
[ 882 ]

### WITHERS v. REYNOLDS (2).

(2 Barn. & Adol. 882—885 ; S. C. 1 L. J. (N. S.) K. B. 30.)

R. agreed to supply W. with straw, to be delivered at W.'s premises, at the rate of three loads in a fortnight, during a specified time ; and W. agreed "to pay R. 33s. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time W. refused to pay for the last load delivered, and insisted on always keeping one payment in arrear :

Held, that according to the true effect of the agreement, each load was to be paid for on delivery, and that on W.'s refusal so to pay for them, R. was not bound to send any more.

ASSUMPSIT for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, Ch. J. at the

(1) 5 B. & Ald. 176.

*Co. v Naylor & Co.* (H. 'L. 1884)

(2) Followed in *Freeth v. Burr*  
(1874) L. R. 9 C. P. 208, 43 L. J.  
C. P. 91 ; and in *Mersey Steel, &c.*

9 App. Cas. 434, 53 L. J. Q. B. 497.  
—R. C.

sittings in Middlesex after last Hilary Term, the agreement proved was as follows :

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“John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stable-keeper, and delivered on his premises as above” (*i.e.* at Long Acre, London) “till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

(Signed) “JOSEPH WITHERS, JOHN REYNOLDS.”

The straw was regularly sent in from the 20th of October, 1829, when this agreement was made, till the end of January, 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant 11*l.* 11*s.*, being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered: and he then told the plaintiff that he would send no more straw unless it was paid for on delivery: and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own shewing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord TENTERDEN, Ch. J. was of this opinion; but directed a verdict for the plaintiff, reserving the point. A rule *nisi* was afterwards obtained for entering a nonsuit.

[ 883 ]

*Campbell and R. V. Richards* now shewed cause :

Two things independent of each other were stipulated by this contract to be done by the respective parties: the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle

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[ \*884 ]

the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load \*on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract: *Weaver v. Sessions* (1). And, according to that case, he ought at least to have shewn that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross action, but has no defence to this.

*Platt, contra :*

The only question is upon the construction of this agreement. It is true, no time of payment was specified, but in the absence of any express stipulation, the money would be payable on demand as often as it became due; and here the words, "to pay thirty-three shillings per load for each load so delivered," intimate that the price of each load was to be due as soon as it was delivered. (Here he was stopped by the Court.)

LORD TENTERDEN, Ch. J. :

[ \*885 ]

I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery" (for \*that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so.

PARKE, J. :

WITHERS  
v.  
REYNOLDS.

The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery, (as he did, in substance, when he insisted on keeping one load in hand,) the defendant was not obliged to go on supplying him.

TAUNTON, J. :

The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds, that the plaintiff shall pay that sum "for each load of straw delivered on his premises," from the date of the agreement till the 24th of June, 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTESON, J. :

If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw : but the plaintiff here expressly refuses to pay for the loads as delivered ; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

*Rule absolute.*

## WATTERS v. SMITH (1).

(2 Barn. &amp; Adol. 889—895.)

1831.  
Nov. 14.

[ 889 ]

B. and C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of suit. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in that action. A. afterwards sued C. : Held, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and, therefore, it was no defence for C.

ASSUMPSIT for work and labour, care, and attendance. Plea, *non assumpsit*. At the trial before Lord Tenterden, Ch. J.,

(1) See the judgment on a similar point in *Ex parte Good, In re Armitage* (1877) 5 Ch. D. 46, 46 L. J. Bkcy. 65.—R. C.

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v.  
SMITH.

at the London sittings after Michaelmas Term, 1830, it was proved that the plaintiff had been appointed to the situation of assistant surgeon and apothecary in a certain institution called The Royal Western Hospital, which was under the management of a committee. The defendant and George Hunter were both members of this committee. The plaintiff had claimed from the defendant, by a letter before the action, 48*l.* 16*s.* as the whole amount of his demand; in the action, however, his claim was reduced to 28*l.* 16*s.* It was proved, on the part of the defendant, that the plaintiff had already sued Hunter for the whole of the same demand. On the 1st of May, 1830, Hunter's attorney addressed the following letter to the plaintiff's attorney:

[ \*890 ]

"SIR,—With reference to our conversation yesterday, I send you underneath (without prejudice) the \*terms upon which I propose to compromise this suit. I think it however but fair to premise, by representing to you the peculiar hardship of the case as regards Mr. Hunter. You have, unfortunately, fixed upon the very one of all the committee who knew least of the affairs of the hospital, or of the parties connected with it; who subscribed to it (as he does to many other public charities in the metropolis) solely from motives of charity, and only consented to act on the committee at the particular solicitation of a friend, who was rather more eager in the welfare of the institution than the little personal interest he had in it required. I am not in general fond of appealing to the feelings, but I do think this is one of those cases in which such circumstances should be considered and have weight. Should, however, your client think otherwise, and persist in his endeavour to exact his demand to the fullest extent that the strictness of the law will give him, from this defendant, when there are so many others equally responsible, and upon whom the claim would with much more justice be made, I must beg you to remind him of the circumstances I stated in conversation to you yesterday, which, supposing him to obtain a verdict in his favour, would so considerably reduce it in amount. I propose, therefore, to put an end to the action by paying down 15*l.* and the costs of suit, upon receiving a proper discharge. Such sum would, even then, be five or six times more than the amount of Mr. Hunter's proportion of the demand."

The plaintiff having agreed to stay the action against Hunter on receiving 15*l.* and his costs, that amount was paid, and the following receipt was given by the plaintiff's attorney :

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"Received, 10th May, 1830, of the defendant, the sum of twenty pounds fourteen shillings and sixpence, being the amount to be taken for debt and costs in this action."

[ 891 ]

A declaration had been filed, and a rule to plead given ; but after this payment no further proceedings took place. It was urged for the defendant, that the plaintiff, having accepted a composition from Hunter, could not now sue any other person liable to the same debt, but that it was wholly discharged. Lord TENTERDEN, however, was of opinion that the transaction operated only as an arrangement for the relief of Hunter. A verdict having been found for the plaintiff, in Hilary Term last a rule *nisi* was obtained for a new trial.

*R. V. Richards* now shewed cause :

The payment of the money in the former action was no bar to the plaintiff's claim in the present. It was only a fair arrangement that Hunter should pay his portion of the debt, and not be driven to sue the other persons, who were jointly liable, for a contribution. This payment could not be pleaded in bar in any way, for there has been no judgment, and no rule of Court for a discontinuance or for the payment of the money to the plaintiff. In point of law the plaintiff might still proceed against Hunter ; for payment of a less sum of money cannot be satisfaction of a larger. The plaintiff's receipt would not have prevented his suing for the balance : *Fitch v. Sutton* (1). There the terms of the receipt were still stronger than in the present case. Then if the action against Hunter \*has not been barred, still less can Smith avail himself of the transaction in discharge of the present claim. This point was considered in *Power v. Butcher* (2) ; but did not properly arise, and was not decided. In *Com. Dig. Audita Querela* (A), it is stated, "If upon a joint trespass by A. and B. there be a recovery against A. in C. B. upon a declaration in London, and against B. in B. R. upon a declaration in another

[ \*392 ]

(1) 5 East, 230.

(2) 34 R. R. 432 (10 B. & C. 329).

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v.  
SMITH. county, and A. pays the whole, B. after he is taken shall have an *audita querela*." There must be an entire payment of the whole.

(LORD TENTERDEN, Ch. J.: The mere recovery against one will not do.)

There was no intention on the part of the plaintiff to give a discharge of the whole debt; an offer was made to him to accept a sum as Hunter's proportion, and he assented to it.

*F. Pollock, contra:*

*Fitch v. Sutton* (1) does not apply; but the present case is more analogous to *Longridge v. Dorville* (2), where it was held that the giving up of a suit instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. So here Hunter may have intended to contest his liability, at least as to the whole amount; and that being a matter of doubt may have formed the ground of the plaintiff's agreement to take the smaller sum. If so, this is clearly a discharge of the whole debt; and if the suit had been continued, might have been pleaded by Hunter *puis darrein continuance*; and though there has been no formal conclusion of that action, yet it must be allowed that it was ended. Then if in this action against Smith, he had pleaded in abatement the non-joinder \*of his partner Hunter, and the plaintiff had commenced a fresh action against them both, Hunter could have pleaded this matter in discharge, and must have succeeded. It is clear, therefore, that Smith may now say the whole debt has been satisfied. The case of trespass, where the liability is joint and several, does not apply here. If the present plaintiff intended to keep the other parties liable, he should have made an express reservation of his rights as against them.

LORD TENTERDEN, Ch. J.:

This is the case of a plaintiff having a demand against several persons, all of whom he might have sued jointly, or any one separately, subject to a plea in abatement. He sued one, namely, Hunter, alone, who did not plead in abatement; and

(1) 5 East, 230.

(2) 5 B. & Ald. 117.

since then another, namely, the defendant, who likewise has not pleaded in abatement. Hunter being sued, his attorney wrote a letter, stating the hardship of his client's being compelled to pay the whole debt, and offering to pay a proportional share. This offer was accepted, and the plaintiff gave a receipt for debt and costs in that action. He then commenced this suit against the defendant for the balance. It is contended that the debt is already discharged, but the question is, whether the plaintiff intended to discharge the whole debt, or only to relieve the party proposing to pay a proportion of the debt. I think the former construction would be hard and injurious. Where several persons are liable for the whole, it is by no means unusual for a creditor to accept proportionate shares from some, and take his remedies for the rest against the others. And there is nothing unjust in this. The composition between the plaintiff and Hunter will not relieve the latter from contribution to Smith, if he is compelled to \*pay a larger proportion than would have been due as between the parties. It can in no manner operate to his prejudice, but must rather be to his benefit, inasmuch as the plaintiff recovers a less sum from him by the present action than would otherwise have been claimable. It would make the act of the plaintiff operate directly contrary to his intention, and also to justice, if we were to hold that it was in point of law a discharge of the whole debt. The rule for a new trial must, therefore, be discharged.

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c.  
SMITH.

[ \*894 ]

PARKE, J. :

It is not necessary to consider what would have been the effect of the payment of 20*l.* if it had been made in full satisfaction of the demand against Hunter. If the case rested upon this, it might be a bar to the action, on the authority of *Longridge v. Dorville* (1). But I think that question does not arise here from the facts. Looking at the terms of the agreement as contained in the letter from Hunter's attorney, and the receipt, it is manifest that the payment was not made in discharge of the plaintiff's rights against all other parties; and the result of the whole is, that it does not operate as a release, or matter which could have been pleaded as

(1) 5 B. & Ald. 117.

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an accord and satisfaction, but amounts merely to an engagement not to sue Hunter, which can only be pleaded by himself; if the action, therefore, had been brought against two parties, it would not have been a discharge to both. Or, it may be considered as a release to one, qualified by a reservation of the plaintiff's rights against the other, as in *Solly v. Forbes* (1). The rule, therefore, must be discharged.

[ 895 ] TAUNTON, J. :

A release given to one of two joint contractors, enures to the benefit of both : so a judgment and satisfaction as to one, is a stay of proceedings against the other. But here has been neither release nor judgment, nor is there any evidence of an accord and satisfaction of the debt either with reference to Hunter or the defendant. When the case was moved, it was stated that the language of the receipt purported that the money was paid in discharge of the whole debt and costs, and, therefore, that which was a discharge of Hunter in that action would operate as such for the defendant in this. But on looking at the words of the receipt itself, it is only an acknowledgment of money having been paid in the course of that suit, on the receipt of which the plaintiff agreed to rest satisfied, and not proceed farther against Hunter. It is no release ; and *Fitch v. Sutton* (2) decides that such a payment was not a satisfaction, especially of Smith's debt, whose name was never mentioned.

PATTESON, J. :

It is clear from the evidence that the plaintiff accepted the money, not in discharge of the debt, but to relieve the defendant in that suit. *Longridge v. Dorville* (3) does not apply ; that case only proves that the giving up a suit which turns upon a doubtful point of law may be a good consideration for a promise to pay stipulated damages. But there the agreement was, that there should be a final settlement of the whole matter ; whereas here nothing of that kind was understood.

*Rule discharged.*

(1) 22 R. R. 641 (2 Brod. & B. 38).

(3) 5 B. & Ald. 117.

(2) 5 East, 230.

JOHNSON *v.* DURANT AND ANOTHER.

(2 Barn. & Adol. 925—931; S. C. 1 L. J. (N. S.) K. B. 47; S. C. at Nisi Prius, 4 Car. & P. 327.)

1831.  
Nov. 18.  
[ 925 ]

An order of reference was made in an action where the main point in dispute was, whether certain goods, the value of which (namely 246*l.*) the defendants proposed to set off against the plaintiff's claim, had been bought by the plaintiff of the defendants, or of A. B. The question stated in the order was, whether or not the defendants were entitled to set off the sum of 246*l.* The arbitrators (as was alleged) being unable to decide the main point, but finding that, at all events, a small deduction (8*l.* 12*s.*) was to be made from the 246*l.*, awarded, in the terms of the order of reference, that the defendant was not entitled to set off 246*l.* A rule was obtained for setting aside the award as not being final, but it was afterwards discharged. The plaintiff then brought an action of debt on the award; and the defendants pleaded a set-off to the amount of 237*l.* 10*s.* 6*d.* :

Held, that they could not now set off the difference between the 246*l.* and 8*l.* 12*s.*, for that the award was conclusive as to the sum now sought to be set off, as well as that mentioned in the order of reference; and if the arbitrators had gone upon a mistaken ground, their decision could not be questioned in this form.

DEBT on an award. The declaration stated that a cause was depending between the plaintiff and the defendants in the King's Bench, and a certain question having arisen between them, whether the plaintiff was entitled to recover, as against the defendants, the sum of 246*l.* 3*s.*, part proceeds of a certain bill of exchange for 292*l.* 10*s.*, in question in that cause; and also, whether, against such amount, the defendants were entitled to a set-off of the like sum of 246*l.* 3*s.* for a bale of silk, it was ordered by Lord TENTERDEN, that that question should be referred to the arbitration of P. E., B. C., and J. G., who afterwards awarded and determined that the plaintiff was entitled to recover against the defendants the said sum of 246*l.* 3*s.*, part proceeds of the bill of exchange in the said order mentioned, and that against such amount the defendants were not entitled to set off the like sum of 246*l.* 3*s.* for a bale of silk. The declaration then stated, that the plaintiff had demanded this sum of 246*l.* 3*s.*, but the defendants had not paid it. To this were added the usual money counts. The defendants pleaded to the first and fourth counts (the latter being for interest), a set-off for goods sold and delivered, and money had and received, and due and owing; and to the other counts, *nil debent* : and they paid \*8*l.* 12*s.* 6*d.* into Court. In his replication the plaintiff denied the set-off.

[ \*926 ]

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v.  
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At the trial before Lord Tenterden, Ch. J., at the sittings after last Michaelmas Term, in London, the plaintiff proved the execution of the award. It was then proposed, on the part of the defendants, to shew that the plaintiff was indebted to them in a sum of money less than 246*l.* 3*s.* for a bale of silk. It was admitted that the question as to the right of the defendants to set off in respect of that bale of silk had been considered by the arbitrators, but it was contended, that they had only adjudicated that the defendants were not entitled to set off the precise sum of 246*l.* 3*s.*, but had not determined whether the plaintiff was not liable to some extent. Lord TENTERDEN, however, held that this evidence was not admissible (1), and the plaintiff obtained a verdict. In the ensuing Term, a rule was obtained for a new trial on the ground that the defendant ought not to have been precluded from giving evidence of the set-off, and also upon affidavits which were met by others on the part of the plaintiff. From the whole of these it appeared that the point in dispute was as to a bale of silk which the defendants alleged they had sold to the plaintiff through the agency of Fellowes and Bury, but which, according to the plaintiff, had been sold by the defendants to Fellowes and Bury as principals. The price of this bale would have been 246*l.* 3*s.*, but a deduction of 8*l.* 12*s.* 6*d.* had been made soon after the sale, on account of short measure, and accordingly only 237*l.* 10*s.* 6*d.* could be due. It was alleged in the affidavits that the arbitrators not being able to agree in a decision upon the actual question between the parties, had formed their award in

\*the precise terms of the order of reference, thus finding merely that the particular sum there named was not to be set off; and therefore the defendants contended that the award was not final. On the other hand, it appeared that the defendants had applied to the Court to set aside the award on this ground, and had obtained a rule *nisi*, in which the above objections to the award were specifically stated, and which was afterwards discharged with costs. The affidavits were in some respect contradictory as to the reasons which induced the arbitrators to make this award; but it was shewn that evidence had been given before them of the whole transaction relative to the sale of the silk.

[ \*927 ]

(1) See the reasons fully stated in the judgment.

*Campbell* (with whom was *Talfourd*) now shewed cause :

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DURANT.

This question has been fully settled by the arbitrators, for they have made their award in the language of the submission, which they have properly interpreted. It is clear they have considered the general point in dispute, otherwise the rule for setting aside the award would not have been discharged with costs. (Here he was stopped by the COURT.)

*Sir James Scarlett, F. Pollock, and S. Martin*, in support of the rule :

Although the Court generally hold the award of arbitrators to be binding, yet they will not allow their rules to work injustice, which would be the case if the defendants were to be concluded by this award. There is a peculiarity in the order of reference, for it mentions a precise sum as that claimed in the set-off; but it is clear that the parties never could have intended to bind themselves to that sum. It must have been understood that the arbitrators were not to be so \*controlled. They themselves ought to have considered the fixing the precise sum as a mere error in drawing up the order, and to have determined the merits of the case; instead of which they have considered themselves bound down by the language of the order, and have thus proceeded on a mistaken ground. They have not determined the question really intended to be referred to them, the merits of which were entirely with the defendants.

[ \*928 ]

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

This was an action of debt upon an award; to which the defendants pleaded a set-off, and by their particular claimed to set off the sum of 246*l.* 3*s.* in respect of a bale of silk alleged to have been sold by them to the plaintiff. They also paid a sum of 8*l.* 12*s.* 6*d.* into Court. The reference was by a Judge's order made by consent of the parties in a former action between them. At the trial it was proposed on behalf of the defendants to prove that the sum of 8*l.* 12*s.* 6*d.* was, by consent of the defendants, soon after the sale, allowed as a deduction from the price in respect of short measure or other deficiency; and that the

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[ \*929 ]

arbitrators had considered themselves bound down to the precise sum of 246*l.* 3*s.*, and had made their award for that reason only, and had forborne to decide the real question between the parties, which was, whether the bale had been sold and credited by the defendants to the plaintiff, or by them to Fellowes and Bury, brokers, and by the latter to the plaintiff. A rule of this Court for setting aside the award had been obtained and discharged with costs before the present \*action. It is obvious, by the terms of the reference, both parties considered the sum of 246*l.* 3*s.* as the agreed price of the bale. At the trial it appeared to me, that the arbitrators had put a right construction upon the reference as limiting their award to that sum; but then, as the parties had agreed upon the sum, I thought the question as to the sale was properly the matter for decision by the arbitrators, and that in the present proceeding they must be taken to have decided that question, and I refused any evidence to shew the contrary.

The application for a new trial was for this supposed misdirection; and upon affidavits made for the purpose of shewing that the arbitrators had thought themselves bound, and that if they had not so thought their decision would have been in favour of the defendants, and that upon the merits of that question it ought to be so. And it was very strenuously urged that some way ought to be found to remedy the injustice that would take place, if the defendants were bound by this award.

I should be very sorry to find that in any case the general rules and principles of law had worked injustice in the particular instance. But in the infirmity of all human jurisprudence such events must occasionally happen; and the evil is of less magnitude than the total absence of general judicial rules, or a departure from them to meet the supposed hardship of a particular case.

[ \*930 ]

Affidavits were also laid before the Court on behalf of the defendants; and upon consideration of those on one side and the other, it is by no means clear that the bale was not really sold by the defendants to Fellowes \*and Bury as the plaintiffs contended; and it is quite clear that evidence on that question was laid before the arbitrators. And the utmost that can be inferred from the affidavits will be, that probably the arbitrators,

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finding the decision of that question attended with difficulty, relieved themselves from the difficulty by deciding upon the narrow ground as to the particular sum: or, in other words, which is the strongest way of viewing the case in favour of the defendants, that they made their award on a mistaken ground.

Now, if an award made in pursuance of a Judge's order drawn up by consent of parties, proceeds on a mistaken ground, the proper course of relief is an application to the Court to set aside the award. Such an application was made in this case, and failed; and one object of the affidavits is to invite the Court to rehear that matter, in effect, though, perhaps, not in form. But such a rehearing upon fresh affidavits is contrary to all practice, and to the maxim, *Interest reipublice ut finis sit litium*. And this brings the case to the question, whether the award was conclusive, or the proposed evidence ought to have been received at the trial. And it was contended that, assuming the award to be conclusive as to the particular sum mentioned therein, and in the order of reference, it was not conclusive as to the smaller and different sum now sought to be set off. But it must be remembered that the particular sum was the price agreed upon by the parties. And the question, as it regards the smaller sum, is precisely the same as upon the particular sum agreed. So that the real question is, whether, after a reference and award, the defendants can, in \*an action of debt upon the award, be allowed to impeach and annul it upon the ground that the decision of the arbitrators proceeded upon a mistake.

[ \*931 ]

No authority was cited in support of such a proposition, and I am not aware that any can be found. Surely, if it can be done at all, it must be done by some proper plea to the declaration on the award. In the present case there was no such plea: not only was there no plea that the award was founded upon mistake or misconduct, but not even a plea of the general issue denying the debt claimed on the award. The only plea was a set-off: and the endeavour was to shew under such a plea that the sum awarded was not due from the defendants, but only the small sum of 8*l.* 12*s.* 6*d.*, which had been paid into Court. We think this could not be done, and consequently that the rule must be discharged.

*Rule discharged.*

1831.

BRANDT AND ANOTHER *v.* BOWLBY AND ANOTHER(1).

[ 932 ]

(2 Barn. &amp; Adol. 932—940; S. C. 1 L. J. (N. S.) K. B. 14.)

B., a merchant in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs, in Russia, desiring them to draw upon H. & Co., in London, for the amount, and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July B. wrote a letter, cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs informed B. that they had purchased a cargo for the ship, and should despatch it as soon as possible, addressed to H. & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an indorsed bill of lading to H. & Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they inclosed an unindorsed bill of lading to B. and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange enclosed in this letter were dishonoured, whereupon the plaintiffs' agent in London delivered the indorsed bill of lading to H. & Co. On the 2nd of October B. confirmed the revocation of his order, and on the 24th of November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped, delivered it to B.'s orders, and not to H. & Co., pursuant to the bill of lading.

In an action brought against the ship-owners for not delivering pursuant to the plaintiffs' orders, it was contended, that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment: Held, however, that the property did not vest in B. absolutely upon the shipment, but only subject to a condition that the bills were accepted, and that in default of acceptance, it never did vest in him; and, consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to B.'s order.

ASSUMPSIT against the defendants, as owners of the ship *Helena*, for not delivering to the plaintiffs' orders or assigns at London a cargo of wheat shipped by them. At the trial before Lord Tenterden, Ch. J., at the London sittings after last Trinity Term, the following appeared to be the facts of the case: The plaintiffs were merchants, having establishments at St. Petersburg and Archangel, and Emanuel H. Brandt, brother

(1) The authorities on the question of conditional vesting of property under contracts of sale will be found collected in the arguments in *Shepherd*

*v. Harrison* (H. L. 1871) L. R. 5 H. L. 116, 40 L. J. Q. B. 148. And see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19.—R. C.

of one of the plaintiffs, was their agent residing in London. Mr. Berkeley, a commission merchant, who lived at Newcastle-upon-Tyne, being desirous of making some purchases in corn, sent, in June and July, 1830, to the plaintiffs (through Emanuel H. \*Brandt) several orders for the purchase of corn on his account, directing them to draw upon Esdaile & Co., bankers in London, for the amount, and also upon Harris & Co., in London, to a certain extent. Berkeley chartered four ships, and, among the rest, the *Helena*, belonging to the defendants, and sent them to Russia to be freighted by the plaintiffs. A dispute arose between Berkeley and E. H. Brandt, and the former sent a letter on the 28th of July cancelling every order he had given. That letter was forwarded to St. Petersburg by E. H. Brandt. Various shipments were made by the houses in Russia on account of Berkeley, and were transmitted to England in the vessels chartered by him. Bills were drawn upon Esdaile & Co. for the amount, but on their arrival they were dishonoured, and the cargoes were refused. The question in this case arose as to a cargo shipped by the *Helena*. By a letter dated August 8th, 1830, to Berkeley, the plaintiffs wrote as follows: "We have succeeded in purchasing a cargo of wheat for the *Helena*, and shall despatch it as soon as possible to the address of R. Harris and Sons, London, which house we shall address to-day with regard to effecting the insurance. We trust what we have done for you will meet your approval, although by a communication received from Mr. E. H. Brandt subsequently to our having made this purchase we learn that you have been induced to cancel the several orders in our hands." This cargo was afterwards shipped in the *Helena* for England, and the plaintiffs wrote the following letter to Berkeley: "ST. PETERSBURGH, August 26, 1830. We now have much pleasure in waiting upon you with invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*, Mann. For \*the amount of the former, if found correct, you will please give us credit with 810*l.* 4*s.* 5*d.* An indorsed bill of lading we have this day forwarded to Messrs. R. Harris and Sons of London, at the same time drawing upon them for 673*l.* 15*s.*; and for the balance remaining thus in our favour, viz. 136*l.* 9*s.* 5*d.*, we this

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[ \*933 ]

[ \*934 ]

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day make free to value upon you at three months' date, payable in London to the order of Emanuel H. Brandt, which draft we beg to recommend to your kind protection." An unindorsed bill of lading was enclosed, and an invoice of "wheat bought by order and for account of J. Berkeley, Esq. Newcastle, and shipped at his risk to London, to the address of R. Harris and Sons there, per the *Helena*, Captain James Mann." The bills of exchange enclosed in this letter drawn upon Berkeley and Harris & Co. were presented for acceptance and refused. Whereupon E. H. Brandt delivered the indorsed bill of lading to Harris & Co. and desired them to accept the bill of exchange drawn upon them on his account, and to effect an insurance upon the cargo, which they were to receive on its arrival. In a letter dated September 29, 1830, from E. H. Brandt to Mr. Hedley, (who acted as an agent for Berkeley,) he wrote, "Mr. Berkeley refuses to receive the cargoes or give any instructions for the acceptance of the bills, and I have been obliged for the security of the property to insure the cargoes, and give the captain orders where to proceed to, though of course I still hold Mr. Berkeley answerable for the consequences of his behaviour." "I conceive that you are bound to see that his engagements are fulfilled, and I call on you to see Mr. B. immediately and make arrangements for the acceptance of all the bills without delay." On the 2nd of October, Berkeley confirmed the revocation of his \*orders, and on the 24th of November, E. H. Brandt gave notice to Hedley that he should retain the whole of the wheat for his brother. After which Berkeley offered to pay the price of the wheat and the charges, but it was refused. The captain delivered the cargo of the *Helena* to Berkeley's orders at Grangemouth, and not to Harris & Co. in London according to the bill of lading. Upon proof of these facts, the LORD CHIEF JUSTICE directed the jury to find a verdict for the plaintiffs, and to assess the damages at the price of the cargo when it reached the port of discharge.

[ \*935 ]

*Campbell*, for the defendants, moved for a new trial, on the ground of misdirection, or to reduce the amount of damages :

The ship-owners, who have delivered over the cargo of the

*Helena* to Berkeley, if answerable at all to the plaintiffs, are only so in nominal damages. Berkeley had sent out orders to Brandt & Co., the plaintiffs, to which they had assented, and thereby a contract was established between them. Afterwards Berkeley sent to cancel all his orders; but he could not of himself rescind the contract, Brandt & Co. must also have assented to such cancelling. But they did not so assent after they had received the letter of cancellation; they despatched the cargo by the *Helena*, with an invoice stating it to have been bought for his account and shipped at his risk. On that shipment, then, the property vested in him.

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(LORD TENTERDEN, Ch. J. : He had refused to receive it before that.)

But he was afterwards willing to receive it, and offered to pay the invoice price, and all the charges due upon the cargo. It is clear that trover could not have been maintained against Berkeley for the wheat if he had got possession of it: *Coxe v. \*Harden* (1). There goods were purchased abroad and shipped on account and at the risk of the consignee, and bills of lading were taken from the captain to deliver them to the consignor's own order. One of them was transmitted unindorsed, together with an invoice, to the consignee, enclosed in a letter, informing him that the consignor had drawn upon him for the amount, and an indorsed bill of lading was sent to the consignor's agent. It was held that on the shipment, the property in the goods vested in the consignee. That case is quite analogous to the present, and proves that the wheat could not have been recovered from Berkeley.

[ \*936 ]

(PARKE, J. : In the present case the letter enclosing the bill of lading informed the consignee that an indorsed bill of lading had been sent to another person. That was not so in the case cited.)

But supposing the Court to be of a contrary opinion, then the proper measure of damages was the invoice price of the wheat

(1) 7 R. R. 370 (4 East, 211).

BRANDT     and the charges, not the value at the port of discharge. The  
c.  
BOWLBY.     amount of the damages ought therefore to be reduced.

LORD TENTERDEN, Ch. J. :

[ \*937 ]     There ought to be no rule in this case. It is an action against the defendants as ship-owners, on the bill of lading, by the terms of which the captain undertakes to deliver certain goods shipped for London, at London, to the plaintiffs' orders. The complaint against the defendants is, that instead of delivering them to the plaintiffs' orders, they delivered them at another place, and to a person who had not the plaintiffs' orders. This was a breach of the contract for which the plaintiffs might undoubtedly maintain \*an action against the ship-owners. But they defend themselves under Berkeley, and say that he had a right to receive the goods, for the property had vested in him, and therefore the plaintiffs are not entitled to more than nominal damages. Let us see how that is. The wheat had been purchased on his order, which he revoked. By the original terms of the contract it was to be sent to London, and bills were to be drawn upon Harris & Co. for the amount. Berkeley, however, insisted, he would have nothing to do with it. Emanuel H. Brandt insisted he should, and that he would hold him to his engagement. The plaintiffs send the letter of the 26th of August stating that they have shipped the wheat on his account. At the same time they inform him that they have forwarded an indorsed bill of lading to Harris & Co., and have drawn upon him and them for the amount. He directed them not to accept the bills drawn on them, and they were not accepted. Can it be said that he has performed his part of the contract, which was not only to receive the goods, but also that Harris & Co. should accept bills for payment of the value? He could have no right to the goods unless he allowed Harris & Co. to accept the bills, for that was a part of the bargain. After the refusal to accept, E. H. Brandt effected an insurance on the goods for the use of the plaintiffs. It is impossible, therefore, to say that the property had vested in Berkeley; and the defendants were not justified in delivering the wheat to him. The damages ought to be the value of the cargo at the time when it was to have been delivered, that is, at the port of discharge.

PARKE, J. :

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F.  
BOWLBY.  
[ \*938 ]

I am of the same opinion. This is an action on the bill of lading for not delivering to the \*assignee of the plaintiffs. The defendants have not done that, but have delivered to a third party. In order to defend themselves, they must establish the right of that third party, but in that they have failed. It appears that Berkeley gave orders to the plaintiffs to purchase wheat on his account, and that they consented to execute those orders. Berkeley, however, took upon himself, in his letter of the 28th of July, to cancel his orders. Now, I agree to the law laid down in argument, that a contract cannot be rescinded by one only of two contracting parties ; but the question in this case is, whether the property in the goods shipped ever vested in Berkeley at all. That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct : for, looking to the letter of the 26th of August, it manifestly appears that they intended that the property should not vest in Berkeley unless the bills were accepted. They stated in that letter that they had drawn upon Harris and Sons and Berkeley, bills amounting to 810*l.*, the price of the wheat, payable to E. H. Brandt : and they recommended them to his, Berkeley's, protection. They also stated that they had forwarded to Harris and Sons an indorsed bill of lading, and they enclosed to Berkeley an unindorsed bill of lading. The fact of their transmitting the latter bill of lading to Berkeley, and an indorsed one to Harris and Sons, shews clearly that they did not intend that the profits in the wheat should vest absolutely in Berkeley, but should be subject to a condition that the bills were accepted. As they were not accepted, Berkeley has not performed the condition on which the vesting of the \*property in him was to depend, and therefore it never did vest in him. The only remaining question is as to the amount of the damages. As between the parties in this cause, the plaintiffs are entitled to be put in the same situation as they would have been in if the cargo had been delivered to their order at the time when it was delivered to Berkeley ; and the sum it

[ \*939 ]

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would have fetched at that time, is the amount of the loss sustained by the non-performance of the defendants' contract.

TAUNTON, J. :

The bills drawn by the plaintiffs in payment of this cargo not having been accepted, no property vested in Berkeley. It cannot be said that by the letter of the 29th of September, E. H. Brandt set up again the contract which had been rescinded. That letter is not a waiver of the breach of the contract, but a remonstrance on its non-completion and the non-acceptance of the bills. He does not say, we shall hold Berkeley to his original contract, but that he will be held answerable for the consequences of his behaviour. That must mean for any damage which may accrue from his not performing the contract. As to the amount of damages, I think the value of the wheat on its arrival at the port of discharge where it was delivered to Berkeley, is the amount of the loss sustained by the defendant's breach of contract.

PATTESON, J. :

[ \*940 ]

I am of the same opinion. In *Coxe v. Harden* (1), trover was brought by the indorsee of a bill of lading to recover the value of goods, the possession of which had been obtained by the assignee of the party on whose account they were shipped; and although \*the decision in that case, was, that the action was not maintainable, Lord ELLENBOROUGH, Ch. J. and LE BLANC, J. seem to intimate that an action might have been maintainable by the consignors against the captain. The present action is by the shipper against the owners for not delivering according to the bill of lading. I think such an action is maintainable; and that being so, the only question is, what damages are recoverable? *Primâ facie* the plaintiffs are entitled to recover the sum which the cargo would have brought when it ought to have been delivered to the plaintiffs' assignee. It has been said that the property absolutely vested in Berkeley by the shipment, and if so, that the plaintiffs are entitled to recover nominal damages only; but it seems to me that the bills drawn for the cargo not

(1) 7 R. R. 570 (4 East, 211).

having been accepted, Berkeley had not performed his part of the contract, and therefore the property did not vest in him, and consequently that the plaintiffs were entitled to recover the full value.

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*Rule refused.*

BECQUET AND OTHERS *v.* MARY MAC CARTHY,  
EXECUTRIX OF M. S. J. MAC CARTHY (1).

1881.  
Nov. 24.

(2 Barn. & Adol. 951—959.)

[ 951 ]

To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shewn clearly and unequivocally to be so.

Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the King's Attorney-General in the colony; but it was not expressly provided that the Attorney-General should communicate with the absent party: Held, that such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced.

THIS was an action on a judgment obtained by the plaintiffs against the testator in the Court of the Tribunal of First Instance in the island of Mauritius. Plea, the general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1880, the judgment of the colonial Court was proved. In the introductory part of the judgment, the cause was stated to be between Madame Becquet (the present plaintiff,) and others, residing at Port Louis, plaintiffs, and Mr. Mac Carthy, Deputy Paymaster of his Majesty's forces, "at present resident at the Cape of Good Hope, cited at the domicile of the substitute of the King's Attorney-General in the tribunals and Courts of this colony," defendant; and the Paymaster-General of his Majesty's forces, also defendant. It further appeared, by the minute of the Court, that the plaintiffs had caused the defendants in that suit to be cited to appear before the Tribunal of First Instance on the 16th of December, 1816, to answer the plaintiffs touching a fire which they alleged to have broken out

(1) Compare *Meyer v. Balli* (1876) clearly shewn to be contrary to the law of the country where it was pronounced.—R. C.  
1 C. P. D. 358, 45 L. J. C. P. 741,

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v.  
MACCARTHY. in the Paymaster's office, and consumed a house and premises and other property of the plaintiffs; and that the plaintiffs prayed the said tribunal that the defendants might be ordered to admit or deny that the fire first broke out in the Paymaster's office, and spread from thence till it destroyed the plaintiffs' premises and goods: and, in case of their admitting the same, that Mac Carthy, individually, and likewise the administration of Paymaster, might be condemned, jointly and severally, [ \*952 ] \*under the 1,384th article of the code of laws of the colony, to reimburse to the plaintiffs their damages and costs; or, in case of denial, that an order of the Court might be made for proofs to be adduced, whereupon a report might be made in form of law, and a decision had. The minute then stated, that on the cause coming on for hearing on the 16th of December, 1816, default was granted against Mac Carthy, and the cause remanded to the 5th of May following, during which time it was ordered that the party in default should be re-cited. It was then stated, that by a writ served on the 21st of December, 1816, the sentence above mentioned was judicially notified to the defendants, with a citation to appear on the 5th of May, 1817, and that on that day, the Court, by its sentence, granted a definitive default against Mac Carthy (he not appearing, nor any one for him), and ordered that the documents and readings of the parties appearing should be communicated to the substitute of the King's Attorney-General, together with the notes of the pleadings, in order to the necessary decree being made. This sentence, it was stated, the plaintiffs caused to be notified to the defendants. The point for the adjudication of the tribunal was stated to be, whether the administration of the Paymaster-General of the British forces was responsible for the loss arising from the *quasi* crime imputed to the superintendent of such administration, under the 1,384th article of the code, and whether the conclusions and condemnations prayed against the said administration, and against Mac Carthy personally, were well founded? The tribunal, by its judgment, given on the 9th of February, 1818, (and on which the present action was brought) condemned Mac Carthy in default in the legal indemnifications prayed, and in costs; [ \*953 ] and \*the damages having been assessed, it was afterwards

adjudged that Mac Carthy should pay the plaintiffs 18,371 piastres.

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On the trial of the present cause it was objected, that this judgment was invalid on the face of it; for the following among other reasons: First, that assuming it to have proceeded on the 1,384th article of the French Code Civil, livre 3, tit. 4, chap. 2, ("On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde,") and admitting that the fire first began in the premises occupied by Mac Carthy, it did not appear upon the face of the judgment that he was charged with any negligence, or that he had been guilty of any, by himself or his servants; and, secondly, that Mac Carthy was shewn by the judgment itself, to have been absent from the island at the time of the proceedings against him, and it was contrary to justice that a man should be condemned unheard; on which head *Buchanan v. Rucker* (1), and *Cavan v. Stewart* (2) were cited. Lord TENTERDEN reserved the points; and the plaintiff proved that, by the law of the island, whenever an action was commenced against a person who had been once resident in it, but had afterwards absented himself, process was served for him upon the King's Attorney-General. The defendant then gave evidence to contradict the facts upon which the judgment proceeded. A verdict having been found for the plaintiffs, a rule *nisi* was obtained for entering a nonsuit upon the objections taken to the judgment, or \*for a new trial, upon the ground that the verdict was against evidence.

[ \*954 ]

*Campbell and Hoggins* in this Term shewed cause:

It is not clear that the evidence given to contradict the judgment was admissible, though it be generally assumed that a foreign judgment is only *primâ facie*, and not conclusive evidence of a debt.

(PARKE, J.: The VICE-CHANCELLOR has held, in *Martin v. Nicolls* (3), that the grounds of a foreign judgment cannot be

(1) 9 R. R. 531 (9 East, 192, 1 Camp. 63).

(2) 1 Stark. 525.

(3) 3 Simons, 458.

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MACCARTHY. reviewed in the Courts of this country; and that a bill for a discovery and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on the judgment in this country, was demurrable.)

If that be so, the application for a new trial is answered. Then, as to the objection arising on the face of the judgment, it ought to appear clearly and demonstrably on the face of it, to be contrary to the law of the country where it was given, before a Court in this country can be induced to say it is void on that ground. (They then proceeded to contend that this judgment was not clearly repugnant to the French Civil Code, art. 1,384.)

Then as to this being a decree against Mac Carthy in his absence: First, this case is distinguishable from *Buchanan v. Rucker* (1); for there it did not appear that the defendant had ever been in the colony, or that the judgment was in respect of a cause of action which accrued in the colony. *Cavan v. Stewart* (2) shews only that a party is not to be charged on a foreign judgment, unless it be proved that he was summoned, \*or was once resident within the jurisdiction. Here, it appears that Mac Carthy was in the island when the action accrued, and continued to hold an office there when the proceedings were commenced. In *Douglas v. Forrest* (3), it was held that an action was maintainable in the English Courts on a Scotch judgment of horning, obtained against a Scotchman born, who was absent, and had no notice of any of the proceedings. That case is precisely in point. Besides, here the party, though absent, was represented by the King's Attorney-General; he was, therefore, virtually present. According to the Code Civil, livre 1, tit. 4, chap. 1, art. 114, "Le Ministère public est spécialement chargé de veiller aux intérêts des personnes présumées absentes; et il sera entendu sur toutes les demandes qui les concernent." And according to the Code de Procédure Civile, partie 1, livre 2, tit. 2, art. 69, "Seront assignés: Ceux qui n'ont aucun domicile connu en France, au lieu de leur résidence actuelle: si le lieu n'est pas connu, l'exploit sera affiché à la principale porte de l'auditoire du

(1) 9 R. R. 531 (9 East, 192, 1 Camp. 63).

(2) 1 Stark. 525.

(3) 29 R. R. 695 (4 Bing. 686).

tribunal où la demande est portée ; une seconde copie sera donnée au procureur du roi, lequel visera l'original : Ceux qui habitent le territoire Français hors du Continent, et ceux qui sont établis chez l'étranger, au domicile du Procureur du Roi près le Tribunal où sera portée la demande, lequel visera l'original, et enverra la copie, pour les premiers, au ministre de la marine, et pour les seconds, à celui des affaires étrangères."

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*The Attorney-General, Sir James Scarlett, and Wightman, contrà :*

First, the verdict was against evidence, \*inasmuch as the facts proved shewed distinctly that the fire did not originate on Mac Carthy's premises ; and, secondly, the judgment is void on the face of it, because the complainants ought to have alleged in their pleadings, and to have proved by their witnesses, that the fire originated in Mac Carthy's premises by the negligence or imprudence of him or his servants. Here, what he is called upon to admit or deny is, not whether he or his servants have been guilty of negligence, but whether the fire originated in his house. Now, it may have so originated in his premises, without any fault of himself, or his servants, as by lightning, or the act of an incendiary. By the common law of England, a man was liable for so negligently keeping his fire, that the house or property of his neighbour was damaged thereby ; and though the fact of the fire having first broken out in the defendant's house might be *prima facie* evidence of negligence, still it was necessary to charge him directly with negligence in the declaration : *Turbervil v. Stamp* (1) ; but, in the present case, negligence or default of the defendant, or his servants, is nowhere alleged or suggested upon the French proceedings, as it ought to have been to warrant the judgment against him. But assuming that the judgment is warranted by article 1,384 of the Code Civil, still it appears that the proceedings were instituted in the absence of Mac Carthy. In *Buchanan v. Rucker* (2) Lord ELLENBOROUGH said, " It is contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he is heard." It is certainly true that, according

[ \*956 ]

(1) 1 Salk. 13.

(2) 1 Camp. 63, at p. 66.

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 [ \*957 ]

to the law of the island, process may be \*served in the absence of the party upon the King's procureur; but, in order to make that a good practice, it ought to be shewn that that officer is compelled to hold communication with the absent party. In *Douglas v. Forrest* (1) the defendant had property in Scotland.

*Cur. adv. vult.*

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

[ \*958 ]

This was an action brought upon a judgment recovered in the island of Mauritius. That island, at the time of the suit in which the judgment was given, belonged to the sovereign of this country, but the French law then prevailed there. The judgment was recovered by a person whose premises had been destroyed by a fire which began in the premises belonging to or occupied by the testator, at that time Deputy Paymaster of the forces in the island. Among other objections taken to the validity of this judgment, one was, that supposing the Court to have proceeded upon the article 1,384 of the Code Civil, and taking it for granted that the fire originated in premises occupied by the testator, still that was not sufficient to make him liable, because the fire might have begun without the fault of the testator or any of his servants. The law of France being the law of the colony at the time when the judgment was pronounced, the French Court was much more competent to decide questions arising upon that law than we can be. We ought to see very plainly that that Court has decided against the French law before we say that their judgment is erroneous upon such ground. Now, upon a careful review \*of the 1,384th article, we cannot say that a person may not be answerable for damage done to his neighbour's property by reason of a fire originating upon his own premises, even although it cannot be proved that he or any person belonging to him set them on fire wilfully, or otherwise, for he is answerable, according to that article, *du dommage que l'on cause par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde*; that is, for whatever damage is occasioned by the things which he had under his care. Now, that may apply to a house. Indeed,

(1) 29 R. R. 695 (4 Bing. 686).

by the law of this country before it was altered by the statute 6 Ann. c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house. We cannot then say that a French judgment, founded on the article in question in the Civil Code, is necessarily bad, because it is not averred in the proceedings that the accident was caused by negligence.

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Another objection, and not an unimportant one, was, that the testator, when the proceedings were instituted against him, was absent from the island; and it was urged, that it was contrary to the principles of natural justice that any one should be condemned unheard, and in his absence. Proof, however, was given, that by the law of the colony, in the case of a person formerly resident in the island, absenting himself, and not leaving any attorney upon whom process in a suit might be served, \*the Procurator-General or his deputy was bound to take care of the interests of such absent party. It was said that the law of the island did not provide any means whereby the Procurator-General or his deputy might be required to hold communication with, or receive directions from an absent person. There may, perhaps, be some deficiency in the law in that respect; but as the law of the island is, that the process shall be served upon the public officer, it must be presumed that he would do whatever was necessary in the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served. For these reasons we are of opinion, that the rule for a new trial should be discharged.

[ \*959 ]

*Rule discharged.*

1831.  
Nov. 2.

[ 10 ]

# GOWER v. JONES.

(1 L. J. (N. S.) K. B. 10—11.)

Contract for the purchase of a cargo of olive oil, delivered on the quay, alongside the vessel, to be removed from the quay by the purchasers after passing the scale, and to be at their risk from the time of weighing. Payment to be made by cash for one half the amount of the invoice, the remainder by bills at four months. The true construction of such a contract is, that the goods should be delivered to the purchasers at the quay, and that the cash should not be paid till after the completion of the delivery of the goods, by their having been weighed and the invoice made out.

Therefore no action lies by the seller against the broker for a breach of duty in delivering the goods to a purchaser (who became bankrupt) without receiving payment of the cash at the time of the delivery.

THIS was an action brought to recover the sum of 3,406*l.* 11*s.* 1*d.* from the defendants, who were the plaintiff's agents for the sale of a quantity of oil; the declaration alleging a breach of duty in the defendants in not procuring from the purchasers, cash for one half the amount of the invoice on delivery.

[ 11 ]

At the trial, before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, it appeared that the plaintiffs, who were merchants in London, had employed the defendants, brokers, in Liverpool, to sell a cargo of oil, per ship *Pacific*, and to deliver such cargo to the purchasers; that the defendants, accordingly sold the cargo to Messrs. Lapage & Co., merchants in Liverpool, under the following contract:

“LIVERPOOL, 17th Dec., 1830.

“Messrs. A. A. Gower, Nephews & Co. London, per Messrs. Jones, Mann and Foster, Liverpool.

“We have this day bought from you the entire cargo of olive oil, to arrive per the *Pacific* from Malaga, at 51*l.* per imperial ton, duty paid, delivered at the quay, alongside the vessel, at this port, warranted of fair merchantable quality, to be removed from the quay by us after passing the scale, and to be at our risk from the time of weighing; payment to be made by cash for one half the amount of the invoice, deducting two and a half per cent. discount, and by our acceptance at four months date, without discount, for the remaining half; and the invoice to be dated from the last day of delivery.

(Signed) “LAPAGE & Co.”

It appeared also, that the defendants delivered the whole of the oil to Lapage & Co. (who afterwards became bankrupts), without receiving any part of the price.

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v.  
JONES.

LORD TENTERDEN, Ch. J., was of opinion that the true construction of the contract was, that the cash should be paid, after the completion of the delivery, by the goods having been weighed, and the invoice made out; and the plaintiffs were accordingly nonsuited.

*Sir James Scarlett* now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial had, and contended, that the words "delivered on the quay alongside the vessel," did not necessarily imply that the cargo should be delivered to the party himself; but, within the meaning of the contract, the delivery contemplated was complete immediately the casks were at the quay, and it did not even necessarily imply that the goods should be unshipped: the word "delivered," as used in the contract, is no more than if the word "landed" had been made use of. "To be removed by us" (the purchasers), seems to imply that, but for such a stipulation, the goods might have been moved by the sellers after their arrival at the quay, and that, until the removal, they were to have the custody of the cargo; and the terms of the contract, that it is "to be at our risk from the time of weighing," shew that the delivery was not to be made to them until the cargo had been weighed; but there is implied in those terms, that the goods should remain at the quay; because, if the purchasers could have removed them immediately, there could be no doubt that they would be at their risk without the introduction of any such clause. The term "delivery" also, as applied to the date of the invoice, is used in the same sense as in the former part of the contract; and it must be taken to mean that the invoice should bear date from the last day of landing.

LORD TENTERDEN, Ch. J. :

It appears to me that the construction I put on this contract at the trial was right: the contract was for the purchase of the

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entire cargo of olive oil, to be delivered on the quay alongside the vessel. This appears to me to mean that it should be delivered to the purchaser at the quay; and by the terms of the contract, the oil is to be removed from the quay by the buyers as soon as it has passed the scale, when payment is to be made by cash for one half the amount of the invoice, and the remaining half by bills at four months from the last day of delivery. I therefore am of opinion that payment could not have been required, until the invoice, (the amount of the prices and quantities,) were made out.

PARKE, J. :

The cargo was to be delivered to the purchasers at the quay alongside the vessel; the payment by cash is, by the contract, to be made for one half the amount of the invoice. The parties must be taken to contemplate one entire transaction, and one half of the amount of the invoice cannot be ascertained until the invoice be made out, which is to bear date the last day of delivery; until which time, therefore, no payment could have been required.

TAUNTON, J. and PATTESON, J. concurred.

*Rule refused.*

1831.

[ 2 ]

### NURRELL v. LARKIN.

(1 L. J. (N. S.) C. P. 2—3.)

A carrier is answerable for safe delivery as well as for safe conveyance. If, by the course of dealing, the owner of the goods supplies the means of delivery, and these means fail, without the default of the carrier, the latter is exonerated from the delivery.

THIS was an action against a carrier for negligence in the delivery of a pipe of port wine, tried before the Lord Chief Justice, at Guildhall, when a verdict was found for the defendant.

[ \*3 ] *Taddy*, Serjt. now moved for a rule to shew cause why the verdict should not \*be set aside, and a new trial had:

The wine was carried in the defendant's cart to the plaintiff's house; but, the defendant not having proper tackle to take the pipe out of the cart, applied for assistance to the son of the

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v.  
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plaintiff, and asked for plaintiff's slid. The son replied, "You know where to find it," and he afterwards, with two of the plaintiff's servants, gave his assistance. The defendant used the slid, and placed it to the cart at the wrong end, fixing the prongs to the cart instead of to the ground. The plaintiff's servants advised him to put some straw under the slid; the defendant did not do so, and the slid gave way and bent under the weight of the pipe, by which the head of the pipe was broken in, and nearly the whole of the wine was lost. It was contended that the plaintiff could not complain of an accident occasioned by the means furnished by himself for the delivery. The question left to the jury was, whether the plaintiff had exempted the defendant, as carrier, from the delivery; and they were told, it was the duty of a carrier to deliver, as well as to carry, but, if a consignee took upon himself the delivery, he exonerated the carrier. A carrier is an insurer by the common law, and should provide the proper means for securing a safe delivery; and the plaintiff providing the means is no dispensation by him, and does not exempt the defendant from his common law responsibility.

(GASELEE, J.: The plaintiff offered the slid as sufficient for the purpose. It was not a single instance: the slid had been used before.)

TINDAL, Ch. J.:

I laid down the rule, that in an ordinary case a carrier is liable, not only for safe conveyance, but also for safe delivery. The defendant not having proper materials for the delivery, asked the plaintiff's son where the slid was; which, I thought, implied that it had been used on similar occasions: the son answered, "You know where to find it;" and two of the servants assisted. I left it to the jury, whether this did not form an exception to the general rule; and also, whether there was a want of proper caution in applying the slid. The jury were with the defendant on both points; and as the questions were particularly for them, I do not think the verdict should be disturbed.

*Rule refused.*

1831.  
May 4.

[ 48 ]

# BURROUGHS v. CLARKE.

(1 Dowl. Pract. Cas. 48—51.)

Where an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause.

*KELLY* shewed cause against a rule obtained by *Palmer*, calling on the plaintiff and defendant to shew cause, why they should not pay a Mr. Cully the sum of 50*l.*, or such other sum as should be found due on taxation for his services as an arbitrator. The facts set forth in the affidavits are the following: The cause had been referred at the Norfolk Assizes to three gentlemen, Mr. Cully, Mr. Pratt, and Mr. Evans, a barrister, the two former gentlemen not being in the legal profession. An award was made by Mr. Pratt and Mr. Evans only, Mr. Cully not choosing to attend and join in it, from conscientious motives. The award orders that each shall pay their own costs, and that the costs of the award shall be paid in moieties by the plaintiff and defendant. The amount of the costs of the award was 119*l.* This sum was paid by the defendant. It does not appear how much was paid to each of the two arbitrators. Now, the third arbitrator, Mr. Cully, who did not join in the award, says he ought to be paid a share. But if he has any remedy, it is only by action. The rule of Court empowers the Court to enforce the award. It has been enforced by the payment of the costs, according to its direction. Therefore the Court has no longer any jurisdiction. This application refers to matter entirely *dehors* the award, and is wholly without precedent. It is in fact merely a speculation to try to induce the Court to interfere in that, over which it has no jurisdiction. The rule, therefore, ought to be discharged with costs.

*Palmer*, in support of the rule :

[ \*49 ] When two persons are appointed arbitrators, they are arbitrators for both \*parties. The arbitrator becomes a party to a rule of Court, and there is an express promise, in fact, by the rule of Court, to pay the arbitrator. In a case in the Court of Common Pleas, *Hicks v. Richardson* (1), an attachment was granted against the plaintiff for not performing an award.

(1) 4 R. R. 768 (1 Bos. & P. 93).

TAUNTON, J. :

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That case is materially different from this. There, the money due to the arbitrator was actually paid.

*Palmer :*

In that case EYRE, Ch. J., says, " Shall we oblige the arbitrator to bring an action? Should we not have allowed him to say on this sort of application, that the costs of the arbitration amounted to so much, and that, by the terms of the award, they were to be paid by both parties, and that this plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case, the plaintiff is bound to pay his moiety of the costs. He has submitted, by a rule of Court, to pay them, and the Court will enforce the payment by attachment. It is all matter of form, whether the arbitrator himself applies for the attachment, or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case, for the arbitrator to get the whole costs from the defendant by withholding the award, who may redress himself by one attachment, than for the defendant to have an attachment against the plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment against him for the moiety of the costs of the arbitration. What a scene of litigation, expense, and vexation, might this strictness produce? Supposing no objections \*to the expenses themselves, I think the attachment should issue."

[ \*50 ]

TAUNTON, J. :

But there, one party had paid all the costs, and the Court ordered that each party should pay a moiety, according to the direction of the award. He had a right to contribution there, because he had paid all the costs. The arbitrator had no grievance of which to complain, as he had been fully paid.

*Palmer :*

I submit that this application, founded on the case I have cited, ought to entitle me to have my rule made absolute. Where an

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CLARKE. arbitrator has attended meeting after meeting, and then thinks he cannot reconcile his conscience to the award, he is still entitled to a fair remuneration for his services. Who will undertake the office of arbitrator, if he is to be turned round in this manner and receive nothing for his trouble? As to the proportion of the money paid as costs of the award, which the arbitrator would be entitled to receive, the Court has power to determine that by taxation. In the case of *Barrett v. Parry* (1), the Prothonotary expressed an opinion to that effect.

TAUNTON, J. :

I am of opinion that this rule must be discharged. I intimated, when it was moved, that it appeared to me an application of the first impression; for I remembered one case before I came to the Bar, in which I had a distinct recollection that Lord KENYON ruled that the office of arbitrator was altogether honorary, and that an arbitrator could not maintain an action for his fees (2). And on that occasion the plaintiff, who sued for his fees as arbitrator, was nonsuited. But it is not necessary to give an opinion on that point in this case, because, admitting \*that an arbitrator is entitled to remuneration for his trouble, here, that to which these arbitrators are entitled has been paid. The award orders, that the costs of the award shall be paid in moieties. One moiety is to be paid by one party, and another moiety by the other. Then, the party in whose favour the award is made, applies to one of the arbitrators to know the amount of the charges of the award, and he tells him 113*l*. That sum is paid by the person who so applies, and the arbitrator gives up the award to him. The charges are paid to the arbitrator, who would not have delivered up the award without payment. If this 113*l*. has been improperly divided between two, instead of among three, that is a matter between themselves; and the gentleman who has had the misfortune not to get any thing, if so advised, may bring an action for his share. That he may do, though I give no such advice. If Mr. Cully is entitled to any thing, his

(1) 4 Taunt. 658.

(2) See now, however, *Crampton v. Ridley* (1887) 20 Q. B. D. 48, 57 L. T.

809, where it is stated that in mercantile references there is often an implied promise to pay the arbitrator.—R. C.

only remedy is against the arbitrators. The case in 1 Bos. & P. is perfectly different from this. There, an application was made for contribution, and the Court ruled, that the party who had paid the whole costs, was entitled to an attachment for the non-payment of contribution. What is said by EYRE, Ch. J., went beyond the case, and whatever dropped from him was extra-judicial, and I apprehend there is no reason for any such observation. The rule must therefore be discharged, and as this application is merely experimental, it must be discharged with costs.

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v.  
CLARKE.

*Rule discharged, with costs.*

### UPTON v. UPTON.

(1 Dowl. Pract. Cas. 400—406.)

1832.  
May 9, 12.

Where the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties.

[ 400 ]

*DUNDAS* shewed cause against a rule for setting aside a judgment signed, and execution issued against the defendant, on a *cognovit* given by him to the plaintiff. The facts of the case were these: George Upton, the defendant \*in this case, entered into partnership, on the 21st May, 1827, with the plaintiff, James Upton, as an attorney. It was agreed, after some time, that the plaintiff should retire from the business, on condition of his receiving an annuity of 200*l.*, to be secured by the joint bond of the defendant and a Mr. Blayden Thomson, who was to enter into partnership with George Upton. The bond was accordingly executed. Disputes having afterwards arisen between the plaintiff and the defendant, on account of certain unsettled claims in respect of the former partnership, and the non-payment of the annuity pursuant to the agreement, two actions were commenced by the plaintiff, one for the alleged balance of account remaining unpaid since the dissolution of the partnership account, and the other for the arrears of the annuity. An agreement of reference was signed in the cause, relating to the balance of account; and a *cognovit* given in the action, for the arrears of the annuity. Both the agreement and the *cognovit* were executed on the

[ \*401 ]

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15th June, 1831. The agreement to refer was in these terms: "Whereas disputes have arisen between the said James Upton and George Upton, touching and concerning the accounts between them, and alleged to be due from one to the other of them, and it hath been agreed that the same shall be referred and submitted to the award and determination of Benjamin Scott and William Smith, of Tadcaster, gentlemen. Now, therefore, these presents witness, that, in pursuance of the said agreement, and for finally ending all questions and disputes touching the same accounts, and all matters in dispute between the said James Upton and George Upton, it is hereby mutually agreed by and between the said James Upton and George Upton, that the said accounts, and all matters in dispute between them, shall be and are hereby referred and submitted to the award and determination of the said Benjamin Scott and [ \*402 ] William Smith." The arbitrators \*proceeded, but they took no notice of the annuity, as a matter in difference, at any of the meetings; nor was it ever mentioned, except by the defendant's attorney, who complained of its terms. The arbitrators, in pursuance of the reference, made their award, of which this was the principal clause: "And we do lastly award, order, adjudge, and determine, that, upon payment of the said sum of 88*l.* 10*s.* to the said James Upton as aforesaid, they, the said James Upton and George Upton shall and do respectively, at the costs and charges of the party requiring the same, sign, seal, and, as their respective acts and deeds, deliver, each unto the other of them, mutual general releases in writing of all and all manner of action and actions, cause and causes of actions, covenants, debts, specialties, controversies, clauses, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid agreement of reference." The sum directed having been paid, mutual releases, in exact conformity with the direction of the award, were executed. The annuity remaining in arrear, judgment on the *cognovit* was afterwards entered up, and execution issued against the goods of the defendant for the amount due. The present application has been made on the ground, that, by the general terms of the agreement of

reference, the claim for the annuity was referred also; and the mutual releases, executed in conformity with the award, barred the plaintiff from proceeding on the annuity bond and the *cognovit*. The question, therefore, will be, whether the plaintiff has released the annuity, or the arrears of it. The language of the release is undoubtedly very large, but it is restrained by the intention of the parties. They only intended to release what had been referred to the arbitrators, and the action for the balance of accounts had alone been referred to them; therefore, only claims arising out of that action were released. He cited 2 Rolle's Abridg. 409 (A.), *Knight v. \*Cole* (1), *Abree's case* (2), *Henn v. Hanson* (3), *Payler v. Homersham* (4), *Solly v. Forbes* (5), *Cole v. Gibson* (6), *Ramsden v. Hylton* (7), *Thorpe v. Thorpe* (8). But the release was only of all causes of action "until the day of the date of the aforesaid agreement of reference." The word "until" included the day so mentioned. The *cognovit* was given on the same day as the agreement of reference was signed, and therefore it was excluded from the operation of the release. He cited *Nichols v. Ramsel* (9), *Dixon v. Terry* (10), *Newmand v. Beaumont* (11), *Tuke v. Check* (12), *Trevil v. Ingram* (13), *Hawle v. Kirkeby* (14), 2 Bac. Ab. 404 (T.).

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[ \*403 ]

*Wightman*, *contrà*, contended, that the cases cited were beside the question here to be decided :

The reference here is of "all" matters in difference between the parties. Under those general words, the dispute as to the annuity might have been taken into the consideration of the arbitrators. And, if it might, there are abundance of authorities to shew that it ought. Otherwise, the party is precluded from availing himself of it. In *Smith v. Johnson* (15), Lord ELLENBOROUGH observed: "Here is a reference of all matters in difference, and it appears that the sum in respect

(1) 1 Show. 150; 3 Mod. 277.

(2) Hetley, 15.

(3) Siderf. 141.

(4) 16 R. R. 516 (4 M. & S. 423).

(5) 22 R. R. 641 (2 Brod. & B. 38).

(6) 1 Ves. Sen. 307.

(7) 2 Ves. Sen. 304.

(8) 1 Lord Raym. 235.

(9) 2 Mod. 280.

(10) 4 Mod. 182.

(11) Owen, 50.

(12) Cro. Eliz. 897.

(13) 2 Mod. 281.

(14) Moor, 34, pl. 112.

(15) 9 B. & C. 780.

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[ \*404 ]

of which the deduction is now claimed, was a matter in difference at the time, and within the scope of the reference; notwithstanding which, the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was \*competent to him to have brought the whole under the consideration of the arbitrators; and therefore I think that where all matters in difference are referred, the party, as to every matter included within the subject of such reference, ought to come forward with the whole of his case." He also cited *Dunn v. Murray* (1), and *In the Matter of Robson and Railston* (2).

TAUNTON, J. :

These cases shew that where there are matters in difference, all should be brought before the arbitrator, when the reference is general. But how does it appear that this annuity bond was a matter in difference, when it was so clear that the arrears on it were due, that the defendant gave a *cognovit* for them ?

*Wightman :*

It must be considered as a matter in difference, since an action had been commenced on it for the arrears. Besides, the defendant's attorney complained of the terms of the bond. The arbitrators' attention was therefore called to it, and, being a matter in difference, it might have been taken into consideration by the arbitrators. If it was not taken into consideration, the party is still concluded by the award. The award concluding the party as to the annuity bond, and the release being co-extensive with the award, it therefore released the defendant as to the annuity bond. If an action were brought on this annuity bond, a reference to this release, I submit, would be an answer to it, according to the cases I have cited.

TAUNTON, J. :

The mere complaint of the defendant's attorney, that there was some hardship in the terms of the annuity bond does not

(1) 9 B. & C. 780.

(2) 35 B. R. 426 (1 B. & Ad. 723).

at all shew that it was made a matter in difference, or drawn to the attention of the arbitrator \*in that light. The execution and validity of the bond might have been admitted and agreed on; and therefore, if the argument that the complaint of the attorney as to the terms was calling the attention of the arbitrators to the bond as a matter in difference, it would go to shew, that any *obiter* complaint or remonstrance made by the attorney in the hearing of the arbitrator, was calling the particular subject of the complaint or remonstrance to his attention as a matter in difference. A man may have a mortgage or a bond outstanding, of which he may complain, but which is still so clearly against him that he never thinks of making it a matter in difference. I will look into the cases.

*Cur. adv. vult.*

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[ \*405 ]

TAUNTON, J. after recapitulating the facts of the case :

May 12.

The question is, whether the arbitrators took the arrears of the annuity into their consideration, and included them in the 88*l.* 10*s.*, and whether the release extends to the bond for the arrears of the annuity. It is perfectly clear from the affidavits, that the arbitrators did not adjudicate on the arrears of the annuity, and that they did not include them in the 88*l.* 10*s.* they directed to be paid. Nor does it appear to me, from the agreement to refer, that the parties intended that the arbitrators should adjudicate on the annuity bond, or that it was ever brought to their attention as a matter in difference. They intended, by the agreement, to refer all matters in difference in the action brought to recover the alleged balance of account, and nothing more. It is not to be supposed they intended the arbitrators to adjudicate on the arrears of the annuity, when a *cognovit* had been given for those arrears on the same day as the agreement to refer was signed, and which arrears would consequently be no longer a matter in dispute. If the arbitrators omitted to take into their consideration any thing which the parties intended they should, that \*might be a ground for setting aside the award. The words of the release are certainly general; but the cases of *Payler v. Homersham* and *Solly v. Forbes* are clear authorities to shew that the general words of a release may be limited by the particular matter out of

[ \*406 ]

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which the release springs, and the particular intent of the parties by whom the release is executed; and it is laid down as clear law in the cases cited by *Mr. Dundas*, that the general words of a release may be restrained by a particular recital. Then, if the intention of the arbitrators in awarding the release, though contained in general terms, was, that it should enure only to the particular matters referred to them, that is, to the causes of action which were matters in dispute, (the annuity bond being clearly no matter in dispute at that time, the defendant having given a *cognovit* for it), the general release would not refer to the annuity bond, and therefore did not include it. Though, if I looked to the release only, the words of it are sufficiently general to include the annuity bond. I am, therefore, of opinion that this rule must be discharged, and, as it was applied for contrary to good faith, with costs.

*Rule discharged, with costs.*

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1832.  
June 7.

[ 432 ]

# IN THE MATTER OF SHARPE, GENT., ONE, &C.

(1 Dowl. Pract. Cas. 432—433.)

Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs: Held, that the attorney had no lien on the deeds for the costs: Held, also, that the attorney had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds.

*BUTT* obtained a rule *nisi*, calling on one Daniel Sharpe, an attorney of this Court, to give up certain deeds to the parties entitled to the property to which the deeds related.

*Campbell* shewed cause, and his affidavits stated that an action of trover had been brought by some of the parties who had obtained this rule against Sharpe, for the recovery of the deeds in question. The cause was referred to a barrister, who directed a nonsuit to be entered, and ordered each party to pay his own costs of the reference. Sharpe, in his affidavit, set up a claim to a lien on the deeds for the expenses attending the reference, and also for about 5*l.*, the costs to which he had been put by reason of the numerous applications made to him to

[In re  
SHARPE.  
[ \*433 ]

deliver up the deeds. On these facts, it was contended, that the \*attorney was not bound to give up the deeds, until he was well satisfied that the claimants had a good title to them; and that, in the present case, he had a right to hold them at any rate for the 5*l*.

*Follett* and *Butt* supported the rule:

The attorney cannot retain the deeds on the grounds mentioned. A lien can only arise by contract, either express or implied. There was no such contract in the present case. As to the expenses said to have been incurred by him, he could maintain no action for them, and therefore he can set up no lien for them.

TAUNTON, J.:

I am of opinion that the attorney has no lien for the sums in question. As to the costs of the reference, that matter was in the discretion of the arbitrator; and he has disposed of it. And as to the other sums, I can see no pretence for saying that he has a lien on the deeds for expenses so incurred. It is clear he could not support an action for those expenses.

*Rule absolute.*

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## ASKEW *v.* HAYTON.

(1 Dowl. Pract. Cas. 510.)

1892.  
Nov. 24.  
[ 510 ]

The return of a *certiorari* must return the record itself, and not set it out according to its tenor.

*BLACKBURN* shewed cause against a rule which had been obtained for quashing a *certiorari* and the return to it, and issuing a *procedendo*, on the ground that it did not return the record itself, but merely stated it according to its tenor. That was sufficient.

*Wightman*, *contrà*, cited *Palmer v. Forsyth* (1), where a *certiorari* issued to remove a cause from an inferior Court, and the Court below returned a copy of the record, and not the record

(1) 4 B. & C. 401.

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v.  
HAYTON.

itself; the Court quashed the writ and return, and awarded a *procedendo*.

LITLEDALE, J.:

The rule must be made absolute.

*Rule absolute.*

1832.  
Nov. 24.

# EX PARTE WATTS.

(1 Dowl. Pract. Cas. 512.)

512 ]

The undertaking of an attorney can only be enforced by attachment, where he has given it for his client.

CAMPBELL applied for a rule *nisi* for an attachment against an attorney for not fulfilling his undertaking. A person had become indebted to the plaintiff for various sums of money, which he was unable to pay. The attorney against whom the present application was made, gave his undertaking to the present applicant for the payment of those sums. Although he was an attorney, he did not act as the attorney for the debtor. The undertaking thus given he had not fulfilled.

LITLEDALE, J.:

There is no case in which the Court has interfered to attach an attorney for the non-fulfilment of his undertaking, unless he is engaged as attorney in the cause in which the undertaking is given.

*Rule refused.*

1833.  
Jan. 23.

# REX v. THE INHABITANTS OF LUXBOROUGH (1).

(1 Dowl. Pract. Cas. 527.)

[ 527 ]

Where one inhabitant of a parish has removed an indictment against it, for the non-repair of a road, into the King's Bench, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment.

FOLLETT moved, on the part of the defendants, who were the inhabitants of the parish of Luxborough, to be allowed to plead

(1) Although modern Acts have imposed the duty of repairing roads upon various quasi-corporate bodies, it is not clear that the remedy by indictment against the inhabitants is in all cases superseded. See *Reg.*

guilty to an indictment for the non-repair of a road. After the indictment had been found, one of the inhabitants appeared at the Sessions, and objected to the parish pleading guilty to it. That inhabitant had since removed the indictment by *certiorari* into the King's Bench. As the inhabitants were not disposed to incur any expenses of defending an indictment when they were disposed to plead guilty to it, they now applied to be permitted so to plead.

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THE INHABI-  
TANTS  
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BOROUGH.

PARKE, J. (having learned from the Master of the Crown Office that the inhabitant in question had entered into the usual recognizances to pay the costs of defending the indictment, if a verdict of guilty should be found) :

The inhabitants cannot be permitted to plead guilty to this indictment now that these recognizances have been entered into. They will be in no worse situation in consequence of not being allowed so to plead, since, if a verdict of guilty should pass, the person who has entered into the recognizances will be alone liable for the costs.

*Rule refused.*

## DAVID MORGAN v. MARGARET MORGAN.

(1 Dowl. Pract. Cas. 611—612; S. C. 2 L. J. (N. S.) Ex. 56.)

The mere fact of an arbitrator being indebted to one of the parties is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstance, and, as soon as he knew of it, objected to the arbitrator's proceeding.

1832.  
Nov. 24.  
[ 611 ]

MAULE and V. WILLIAMS shewed cause against a rule for setting aside an award, on the ground of misconduct in the arbitrator. The action came on to be tried at the last Carmarthen Assizes, and was referred to a Mr. Walter Wright, who ordered a verdict for the plaintiff, for 58*l.* 7*s.* 8*d.* In the first place, it is said, that the arbitrator gave more than was claimed, we having in the first instance demanded only 50*l.*; but that we swear to have been a mistake. The action was *v. Poole* (1887) 19 Q. B. D. 602, 683, and 75 (2) ("Vestry"), in the Local Government Act, 1894 (56 & 57 Vict. c. 73).—R. C.

MORGAN  
 v.  
 MORGAN.

brought on a note of hand for 50*l.*, and for 8*l.* 7*s.* 8*d.*, the balance of an unsettled account. The misconduct of the arbitrator is endeavoured to be established by alleging that he examined the plaintiff himself to prove his own case; and that the arbitrator was indebted to the plaintiff in a large sum of money, and had been so for some years; and that that fact was concealed from the defendant, who objected to the arbitration going on before Mr. Wright, unless at all events some one was joined with him. With respect to the plaintiff having been examined, it appears that the defendant was sued as administratrix with the will annexed. The handwriting of the intestate to the note was admitted; but she insisted it had been paid, and, under those circumstances, the arbitrator examined the plaintiff, who was the only person who could give him information about it. The only important objection to the arbitrator is, his being indebted to the plaintiff; and, that he is said to be in difficulties: but that of itself is not sufficient. It is true, there was a sum of money out at interest, in the plaintiff's hands; but, we swear, that we believe him to be a gentleman of property and integrity; and it might be the plaintiff's own wish that the money should remain out at interest, instead of being paid. We also swear, that the arbitrator owed money to the defendant's mother. At all \*events, no case of corruption has been made out to induce this Court to interfere.

[ \*612 ]

*John Evans, contra*, endeavoured to support the rule:

He contended that the circumstance of the arbitrator being indebted ought not to have been concealed from the defendant, and that a case of strong suspicion had been made out. It was not necessary to shew actual corruption or undue motive(1). A witness for the defendant proved that the plaintiff had admitted the note to have been satisfied by commission due to the intestate on sales and otherwise. The plaintiff ought not to have been called to prove his own case. If we had been aware that the arbitrator had been under any pecuniary obligation, we should not have agreed to refer to him.

(1) Per Lord HARDWICKE, in *Sheppard v. Brand*, Cas. t. Hardw. 53.

Per CURIAM:

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We think the arbitrator did right in examining the plaintiff. The handwriting was admitted. He was put upon his oath by the arbitrator, as to whether the money had been paid. That was more for the security of the defendant than for the plaintiff's benefit, for the note remaining in the plaintiff's hands, the presumption was, that it had not been satisfied. No case has gone the length of saying that an award can be set aside because the arbitrator was indebted to one of the parties. It is certainly a matter of suspicion, but it is not of itself sufficient; no corruption is shewn. The other objection has been explained. The rule must be discharged, but without costs.

*Rule discharged, without costs.*

---

REX v. SLOMAN.

1882.

(1 Dowl. Pract. Cas. 618—619.)

[ 618 ]

An attachment will not be granted against a witness for not obeying a *subpœna*, unless the original *subpœna* has been shewn, or if the witness has a reasonable ground for believing that he will not be wanted.

V. WILLIAMS shewed cause against a rule obtained by Knowles, why an attachment should not issue against a witness of the name of Sloman, for not obeying a *subpœna*. The action in which Sloman was subpœnaed was an action of trover against the sheriff, for the value of goods seized and sold by him under a *feri facias* issued against the goods of Lloyd, in an action of *Wandsworth v. Lloyd*. Sloman was the sheriff's officer; but the levy was in fact made by him and a person whom he employed, of the name of Luckett. All, therefore, that Sloman could prove, was equally known by Luckett. Luckett and Sloman were both in attendance for several days at Westminster Hall, when the trial was expected to come on. It is sworn, that a conversation took place between Sloman and Mr. Bell, the plaintiff's attorney, at Westminster, in which Sloman told Bell, that Luckett levied the execution; and that, therefore, he, Sloman, would not be wanted, and should go. That the attorney said, very well; and that the proceeds of the levy were admitted

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SLOMAN.

by the attorney to amount to 68*l.* and upwards. But, there is a formal objection also. They are not in a condition to ask for an attachment, for we swear, that the original *subpœna* was not shewn.

*Knowles*, in support of the rule :

The purpose for which we wanted Sloman was not to prove the levy or the amount. Sloman was, in fact, the defendant. He had been examined before the commissioners of bankrupts, and he was asked, “ had you any notice before the sale, that a docket would be struck ? ” and he answered, “ I had.”

BAYLEY, B. :

Sloman is not aware of the purpose for which you want him. He thinks you only want him to prove the amount of the proceeds.

[ 619 ]

*Knowles* :

He must have been aware for what we wanted him. The action was for selling goods under a *fi. fa.* Notice had been given that a docket would be struck against Lloyd ; but Sloman said he would sell notwithstanding.

BAYLEY, B. :

That is not notice of the bankruptcy.

VAUGHAN, B. :

Have you shewn the original *subpœna* ?

*Knowles* :

The original need not be shewn unless asked for.

BAYLEY, B. :

When you move for an attachment, you must shew the original.

*Knowles* :

Yes : the original rule ; but not the *subpœna*, unless asked for. Sloman absented himself, and thereby committed a contempt.

He sent Luckett down, who did not know the fact we wanted to prove, and the action failed in consequence of his absence.

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BAYLEY, B. :

The Master tells us it is necessary to shew the original *subpoena*. There are cases where the original need not be shewn ; but, it is different where a party is to be brought into contempt. By Sloman and Luckett a conversation is deposed to, in which Bell is distinctly apprised that Luckett seized ; Bell says, very well.

*Rule discharged.*

### FORBES v. KING AND OTHERS (1).

1833.

(1 Dowl. Pract. Cas. 672—675 ; S. C. 2 L. J. (N. S.) Ex. 109.)

[ 672 ]

A count, in an action for libel, charging that the defendant wrote of the plaintiff that he was a “man Friday” to another, was held bad, for want of an averment to shew, that, by the term Friday, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him.

To write of a man that he has been engaged in a gambling fracas arising out of a dispute at play, is not libellous, without an averment that illegal gambling and play were intended by the libel.

THIS was an action for libel, brought by Captain Forbes against the publishers of the *Satirist* newspaper. The fifth and eleventh counts were demurred to. The fifth count was upon the following paragraph : “Langford was conversing \*with his man Friday the other day, on the subject of the slave trade, and enumerating instances of peculiar endowments among the black population. ‘Yes,’ observed Forbes, ‘the history of Hayti affords ample proof that they are equal to us in intellectual endowments.’ ‘You know, Forbes, I fear, but little of history,’ remarked his lordship, looking into the History of England ; ‘you will there read an account of a black prince who was the greatest soldier of his time.’” The libel was set out with the usual innuendoes, but without any introductory averments.

[ \*673 ]

*Mansel* was called on by the Court to support the count :

He contended, that, to write of another that he was a “man Friday,” was actionable. It was an imputation that he was a

(1) *Hoare v. Silverlocke* (1848) 12 Q. B. 626, 17 L. J. Q. B. 306.

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mere tool, and in a state of subserviency to another; and was calculated to degrade him in public estimation.

(LORD LYNTHURST, C. B. : There is no innuendo to apply it in that way. We cannot take notice of "Friday." If you had stated, by way of innuendo, that by "man Friday" was meant to be imputed degradation to the plaintiff, that might have been sufficient.)

They speak of the black population.

(GURNEY, B. : You do not state you are white.

BAYLEY, B. : A man may be black, and be a subject of this realm.)

You would not call a subject of this realm a member of a black population. I submit, that no one can read this paragraph without seeing that its evident object and tendency is to degrade and vilify the plaintiff.

[ \*674 ]

The eleventh count was upon the following statement : " Gambling Fracas. There was a prevalent rumour in the fashionable circles yesterday, that, in consequence of a dispute at play between Mr. Hugh (calling himself Captain) Forbes, and Mr. Tarlton, a gentleman well known in the fashionable world, a meeting was decided on between the mutual friends of the parties, Messrs. Summers and Barnard, and the affair was to come off on Putney Heath, at \*day-break, on Thursday morning. Mr. Tarlton and his friend, Mr. Summers, were on the ground, anxiously waiting the arrival of Messrs. Forbes and Barnard, but these gentlemen did not appear. The disappointment, as may be well imagined, excited in the minds of the attendant gentlemen no very agreeable feelings; and, as soon as it was deemed advisable to leave the ground, Mr. Summers proceeded in search of Barnard (Forbes's second), in order to obtain an explanation of the violation of an engagement that had been settled on all hands, and is usually considered binding. Words led to blows, and blows to a very severe punishment, administered *à la* Cribb on the *corpus* of

Barnard by Mr. Summers. We will not now enter on the question further." There were no introductory averments.

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*Mansel*, in support of the count :

This is a libel tending to hold up the plaintiff to ridicule and degradation. It is headed "Gambling fracas." Gambling cannot be innocent. To write of a man that he is a gambler, is, I submit, actionable.

(BAYLEY, B. : Gambling is playing. There may be innocent gambling. Does every dispute at play degrade or make a man contemptible ?)

He is stated not to have appeared at the ground.

(BAYLEY, B. : He did right.

LORD LYNDEHURST, C. B. : He did not do what was illegal. He never agreed to it ; his second did for him.)

It is an imputation upon us to state that we were engaged in the transaction.

(BAYLEY, B. : That is, that you were engaged in play. There is no other point.)

Does not this account hold the plaintiff up to ridicule, and tend to degrade him ?

LORD LYNDEHURST, C. B. :

Whether or not a count could be framed upon this statement we do not say. You do not shew that he was engaged in illegal play.

BAYLEY, B. :

Undoubtedly, to write of a man what will \*degrade him in society, is actionable. Here, if you had alleged that illegal play was meant, that might have done.

[\*675]

*Judgment for defendants.*



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